IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

THE SINGER MANUFACTURING COMPANY, Petitioner,
vs.
HERMAN CRAMER, Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, for the Ninth Circuit.

BRIEF AND ARGUMENT FOR PETITIONER.

By CHARLES K. OFFIELD.

May it please the Court:

The petition for writ of *certiorari* asked of this court, and to be directed to the United States Circuit Court of Appeals for the Ninth Circuit, is founded on, and asked by, reason of certain facts and conditions appearing in and identified by the petition herewith filed, and is asked broadly upon the ground that the questions presented by the petition are of gravity and importance and that the granting of the petition is necessary to prevent a monstrous injustice to the petitioner, and in the interests of uniformity of decision, and in order that this court may correct a misapprehension of, and a seeming neglect by,

said Circuit Court of Appeals, of vital principles of law laid down by this court in the administration of justice, particularly as applied to patents and inventions and the litigation thereof in the federal courts.

We do not understand that it is either expected or desired by your Honors, that at this time, all of the reasons and grounds for the application for, or to justify the granting of this petition, should be amplified and set forth even approximately, to the extent that these matters should be presented at final hearing, if the petition should be granted; but that it is only expected and desired that such salient features and points should be called to the attention of the court that the court could see that it is such a case as would justify the granting of the writ as to matters of fact and the applied law thereto, and for this reason we shall briefly syllabus those points, which either singly or as an aggregation, will command the attention of your Honors and bring this petition under one or more of those broad rules of right that, from the decisions of your Honors as to these matters, would seem to justify this petition and its recognition and grant. In this brief we shall follow closely the division and classification of the subject appearing in the accompanying petition for writ of certiorari, in relation to which this paper is filed as a brief and argument in support thereof.

Point I.

The petition should be granted, because there has been such diverse construction of the respondent's patent by various federal judges in separate trials as would demand that a final settlement of its rightful construction and application, should be made by this court.

As appears by the record and petition and evidenced also by the judicial reports, there has been three separate trials at the circuit wherein the validity and scope of the respondent's patent was in question as against the same precise sewing machine and mechanism in each case of the petitioner, the Singer Manufacturing Company: The first of said cases being tried in the year 1895 in the Northern District of California, of respondent Cramer against the petitioner's agent, Willis B. Fry, and defended by petitioner, wherein a verdict was instructed by his Honor Judge McKenna for the defendant upon the ground of non-infringement. *Cramer* v. *Fry*, 68 Fed. Rep., 201. The second of said cases being the case at bar, tried before his Honor Judge Beatty, wherein his Honor, although deciding the case ostensibly upon the doctrine of *res adjudicata* as to your petitioner in the Fry case, as a matter of fact also construed the patent and found non-infringement thereof by your petitioner exactly as theretofore found by his Honor Judge McKenna, as appears by the petition filed herein and the extracts from the finding of Judge Beatty as to this matter. The third case or trial is the case here present, in which his Honor Judge Morrow construing the patent in suit found it to be a "narrow one," but nevertheless submitted the case to the jury upon the question of infringement; and as to this finding of Judge

Morrow, we respectfully submit that having so found, the error of submitting the case to the jury upon the question of infringement is too palpable and manifest to need extended comment, as the three judges constituting the Court of Appeals found it necessary to construe the patent, as fundamental and basic, before permitting the judgment to stand, as next follows.

In opposition to the construction placed by Judges McKenna, Beatty and Morrow upon the respondent Cramer's patent as above is the broad, far-reaching construction given to it by Judges Gilbert, Ross and Hawley constituting the Court of Appeals, wherein that court says: "If "the evidence was true that Cramer was the first to pre- "sent a new and useful combination by mounting his "treadle in the vertical cross-brace, thereby obtaining the "advantages which some of the witnesses testified to, he "was undoubtedly entitled to the protection of that com- "bination *and to the exclusive right to mount a treadle* "*in the cross-brace, no matter what the form of the bear-* "*ings of the treadle might be.*"

We have then here, as a matter of fact, the construction of three federal judges given to this patent, two of them, Judges McKenna and Beatty, construing the Cramer patent and finding that upon such construction that the patent is restricted and without extended scope, and there is no infringement, the one, Judge Morrow, construing the patent as a "narrow one," and by such construction undoubtedly taking defendant's structure out from under as an infringement of the first claim, and the construction of three judges, Gilbert, Ross and Hawley, holding the patent to be a basic and pioneer one and to be so wide and comprehensive as to give the patentee the exclusive right to mount a treadle in a "cross-brace," no matter what the

form of the bearings of the treadle might be, the cross-brace even not having to be a vertical cross-brace as made certain by the claims of the patent.

We respectfully submit that, where there is such a wide and diverse construction of a patent among the federal judges, upon exactly the same conditions of fact as to the question of infringement; and where the consequences are so dire as in this instance to the petitioner, by the finding of three of them, who happened to constitute a Court of Appeal—that this court should grant this petition for writ of certiorari to settle this question; that the statutes which make this petition possible, contemplate just such a condition for its grant; and this conflicting finding of the several courts and judges relating to the construction of the patent in suit and the fact of infringement thereof by petitioner's sewing machine would seem to justify and even assure the granting of this petition under the following decisions of this court:

Westinghouse v. *Boyden Power Brake Co.*, 170 U. S., 544.

Hobbs v. *Beach*, 180 U. S., 383.

Mast, Foos & Co. v. *Stover Mfg. Co.*, 177 U. S., 485.

Point II.

The vast sums of money claimed by the respondent Cramer of the petitioner by reason of the patent and this single jury verdict, the methods used by respondent Cramer to enforce such demands and the ignoring of the rules of decision of this court, alone securing such result—represent such matters of gravity and importance as entitle the granting of this petition.

It is, of course, true that the verdict in this case is only for the sum of twelve thousand four hundred and fifty dollars against the petitioner, and if this was all there were to it, so far as the monetary results are concerned, there might be a question as to the rightfulness of the petition and reasonable doubt of expectation as to its grant, but this judgment of twelve thousand four hundred and fifty dollars is simply the beginning of the levy upon the assets of the petitioner that apparently has no end, and as to the contention in sight amounts to many millions of dollars. It appears by the record in this case (Record, pp. 56 and 57) the respondent Cramer at the trial was permitted by the court to amend his declaration so as to restrict and confine the jurisdiction of the court in the assessment of damages to the Northern District of California.

Since the jury verdict as above, the respondent Cramer has brought five separate suits against the petitioner, namely, in the Northern and Southern Districts of California, the Southern District of New York and the Districts of Oregon and Washington, founded upon the same patent and judgment. In each of these cases the jurisdiction of the court and alleged infringing acts are confined in each

instance, to the respective districts. The aggregate amount of damages alleged and asserted in these several complaints amounts to nearly two millions of dollars. (Petition for writ, pp. 8-9.)

As it appears also by the sworn petition filed herewith the respondent Cramer is threatening separate suits against the petitioner by reason of the judgment in this case and his patent in every other of the remaining Federal Districts in the United States, thus putting the petitioner to as many separate trials as there are separate districts. It is entirely evident, judging from the declarations and claims already filed in the separate suits, that the aggregate sums of money claimed and to be claimed under these numerous suits, will aggregate many millions of dollars.

We earnestly contend, that, aside from the fact of this most unparalleled money demand made by the respondent upon your petitioner by reason of this patent and judgment; that the method of the respondent to enforce such demands by separate suits and trials is so extraordinary and unprecedented, that whether or not the patent should be found to be valid or invalid; so unjustifiable and oppressive—that for this reason, if for no other, this court should grant this petition and settle the questions of law and fact involved, for all of the respective Districts, in which said suits are pending and threatened.

Point III.

The petition should be granted because the only rightful construction that can be put upon the respondent Cramer's patent, read in connection with, and in the light of the file-wrapper and contents thereof, is the construction given by his Honor Judge McKenna, in the case of the respondent Cramer vs. your petitioner's agent Fry, 68 F. R., 201.

In this report of the case, and identified by the opinion of Judge McKenna, the Cramer patent with its drawings, specification and claims, are presented in full, together with your petitioner's combined cross-bar and vertical brace with band-wheel and treadle hung therein. It does not seem to us that we can add anything to the clear and comprehensive presentation of the right construction to be given to the respondent's patent in view of the file-wrapper and contents than as shown in this opinion. The case was on trial before Judge McKenna some two weeks, stubbornly contested upon both sides, and to the argument of the court, the conclusions arrived at and the authorities cited, we have nothing or little to add, and certainly nothing to take away. The respondent Cramer, and his counsel, certainly then recognized the rightfulness of this decision at that time, and acquiesced in it, for a considerable period of time. This opinion, and the conclusion thereof and the instruction of the jury to find for the defendant for non-infringement, were all present in the trial before his Honor Judge Beatty, and as appears by the petition for writ of certiorari, filed herein, pp. 6-7, his Honor Judge Beatty, independent of the decision of Judge McKenna, reached the

same conclusion there present. We beg leave to refer to this opinion and as having the same force and effect as if incorporated in this brief and a made a part thereof.

There is, however, one other restriction and limitation put by the file-wrapper and contents of the respondent Cramer upon his patent and the construction given to it not specifically mentioned by Judge McKenna, and that is, that in his application first filed, provided that the bearings of the trunnions cast solid with the treadle, might be *in* or *on* the vertical brace. Record 368 and 379, under the rejections made, this specification was so amended that the bearings are restricted to being placed *in* the brace and not *on* it. This modification in change between the file-wrapper and contents and the patent as granted, made necessary by the references given, or at most a voluntary change and restriction by Cramer himself, is made apparent when we see that the treadle bearings must not only be holes in the extremities of the vertical brace, but that the bearings must be holes *"through"* the vertical brace, for it is perfectly evident that Cramer supposed that the invention of his first claim could not be utilized or even operative in any way unless the precise mechanism and construction identified by this claim was present in the means for carrying out the invention, or, as stated in his specification: " *My invention consists in the construction* " *and combination of parts hereinafter fully described and* " *claimed.*"

We beg leave, also, to quote in connection herewith from the opinion of Mr. Justice Shiras in the case of *Hubbell* v. *United States,* 179 U. S., p. 84, as the latest careful and comprehensive statement of the law as to these matters, appearing as follows:

" It may be observed that the courts of this country can-

"not always indulge the same latitude which is exercised "by English judges in determining what parts of a ma- "chine are or are not material. Our law requires the pat- "entee to specify particularly what he claims to be new, "and if he claims a combination of certain elements or "parts, he cannot declare that any one of these elements "is immaterial. The patentee makes them all material "by the restricted form of his claim. Per Mr. Justice "Bradley in *Water Meter Company* v. *Desper*, 101 U. S., "332, 337; *Morgan Envelope Co.* v. *Albany Paper Co.*, "152 U. S., 425, 429. . . .

"It may be, as the appellant contends, that his method "of communicating the explosive force of the fulminate "to the powder charge is an improvement on previous "methods, and is superior in efficacy to that used in the "Government's cartridges; but our inquiry is not as to the "merits of the patent in suit, but is confined to the ques- "tion whether it covers, in legal contemplation, the de- "fendant's cartridge. . . .

"Nor can we accept the contention that these two com- "binations are identical because they are intended to ob- "tain the same result. What we have to consider is not "whether the end sought to be effected is the same, but "whether the devices or mechanical means by which the "desired result is secured are the same."

We think your Honors will be convinced upon a study of the respondent Cramer's patent and the asserted infringing device of your orator, namely, the device of the Deihl patent, that not only is there an entire difference of mechanical means for carrying out a desired result, but that the results themselves contemplated by the respective device are themselves different.

Point IV.

A rightful construction of the Cramer patent upon the face of the patent itself, without reference to the file-wrapper and contents, and the comparison thereof with petitioner's device, demonstrates clearly the fact of non-infringement of the first claim thereof by defendant's structure.

We respectfully submit that it is not imperatively essential to resort to the file-wrapper and contents of the Cramer patent to determine such construction, as to demonstrating non-infringement thereof, by petitioner's device, and that there are three reasons why the fact of non-infringement can be determined absolutely upon the face of the respondent's patent and a comparison thereof with petitioner's mechanism under the decision of this court.

1. The statement of alleged invention by respondent Cramer in his patent, the terms of limitations and restrictions used in the specification and carried into and made part of the first claim, and the absence of such means and devices and their application and use in respondent's structure, bars any contention of infringement.

2. The restricted field of invention in the sewing machine art at the date of the Cramer patent, the fact that the respondent's device, combined cross-bar, vertical brace treadle and band-wheel, is protected by a patent and respondent's device made thereunder, is strongly presumptive of the fact of non-infringement as to respondent's device, and in view of the nebulous patents in the sewing-machine industry should stand as a conclusive presumption.

3. The burden of proof of infringement rests upon the respondent Cramer, and has not been lifted as to petition-

er's device, especially as petitioner's devices are manufactured under their own (Diehl) patent.

The respondent Cramer, on the face of his patent, makes the following unqualified declarations as to what his inventions consists and the means for carrying it out:

"My *invention* relates to improvements in the *bearings* "of sewing-machine treadles; first, to keep the treadle-"bearings rigidly in line and at a fixed distance apart to "avoid friction, and second, to make its movement in use "noiseless.

"TO THIS END, MY INVENTION CONSISTS IN THE CON-"STRUCTION AND COMBINATION OF PARTS HEREINAFTER "FULLY DESCRIBED AND CLAIMED. . . .

"B REPRESENTS THE TWO TRUNNIONS, CAST AS A POR-"TION OF THE TREADLE AND EXTENDING FROM ITS SIDES "INTO LOOP-HOLES IN THE COMMON CAST-IRON CROSS-"BRACE, C. THESE TRUNNIONS ARE SHARPENED TO AN "EDGE OR CORNER ALONG THEIR LOWER SIDES AND THE "LOWER END OF THE LOOP-HOLE IS HOLLOWED TO AN AN-"GLE MORE OBTUSE THAN THE EDGE OF THE TRUNNION, "TO SERVE AS A BEARING FOR THE SAME AND PERMIT THE "ROCKING MOTION COMMON TO TREADLES. . . .

"THE TREADLE AND ITS TRUNNION-BEARINGS ARE "WHOLLY INDEPENDENT OF THE CROSS-BAR D, EXCEPT ITS "SERVICE, AS STATED, TO HOLD THE BRACE TO THE LEGS. "THE BEARING-HOLES IN THE BRACE ARE FORMED INTO "LONG VERTICAL LOOPS TO PERMIT THE ENTRANCE OF "TREADLE.

"Pieces of leather, F, or other soft material cover the "top and end of each trunnion, serve as cushions to keep "the same close in its bearing, to prevent the noise which "would result were the trunnions permitted to bounce and "thump endwise, when the trunnion is in motion. The "leather F is fitted to the curve of the upper side of the

"trunnion, which is an arc of a cylinder whose center of "oscillation is the lower edge of the trunnion. The same "leather also interposes between the end of the trunnion "and the adjacent iron. *f* is a block serving as a mere "backer, to which the cushion F is attached. This block "conforms to the back and top side of the cushion and "fills the loop-hole in the brace above the trunnion. It "also has tangs or projections *e*, resting in suitable re-"cesses in the brace C, which are held between the brace "and the web of the leg E, by which means the block and "cushion are held in place.

"BELOW THE BEARINGS OF THE TRUNNIONS B, I PRO-"VIDE CUPS M, ATTACHED TO THE ENDS OF BRACE C, TO "CATCH THE OIL THAT USUALLY DRIPS FROM SUCH BEAR-"INGS. BY THIS CONSTRUCTION MY TREADLE BEARINGS "ARE RIGIDLY FIXED, AND IN NO WAY LIABLE TO GET OUT "OF LINE OR TO ACQUIRE ADJUSTMENT. THE USUAL NOISE "IS PREVENTED AND OVERFLOWING OIL IS CAUGHT BEFORE "IT CAN DO DAMAGE.

"I am aware that sewing machine treadles have before "been provided with V-shaped bearings, and I do not "claim the same as my invention; but what I claim, and "wish to secure by Letters Patent, is—

"1. The vertical double brace joining the legs of the "two ends of a sewing-machine, PROVIDED WITH HOLES "THROUGH ITS LOWER EXTREMITIES TO SERVE AS BEAR-"INGS, IN COMBINATION WITH A TREADLE PROVIDED WITH "TRUNNIONS FITTED TO OSCILLATE IN SAID BEARINGS, SUB-"STANTIALLY AS SPECIFIED."

As to the question of infringement and manner of determining the same the case in this court of *Marsh* v. *Seymour*, 97 U. S., 538, lays down the plain rule of determination:

"Investigations of the kind are ordinarily best con-

"ducted by comparing the machine made by the respond-
"ent with the machines made by the complainant's pat-
"ent."

And in the case of *McCormick* v. *Talcott*, 20 How., 409, the court say:

"This court has had before them a species of evidence
"of all others best calculated to conduct them to the truth
"—evidence superior to, and unaffected by, the interests
"or prejudices of partisans, or by the opinions (the rev-
"eries, they may often be called) of a class of men styled
"experts; men as often skillful and effective in producing
"obscurity and error, as in the elucidation of truth. No
"witness can testify so clearly and so impartially as do the
"subjects (though mute) concerning which a controversy
"about identity or dissimilarity is pending."

Let us apply this rule and run a parallelism between the sewing-machine device of petitioner and that of respondent's patent as to the first claim. It is perfectly evident that in respondent's patent not only is the objectionable noise prevented by the appliances and attachments described in the patent, but that the same appliances keep the treadle bearings rigidly in line and a fixed distance apart to avoid friction, for if you remove these appliances the treadle and its trunnions would have free movements endwise and sidewise in the loop-holes, and the bouncing and thumping endwise would of course prevent the possibility of keeping the bearings rigidly in line or at a fixed distance apart.

Turning now to petitioner's structure, the following radical distinction and differences are apparently present without any similarities of function, purpose, operation or result. Remembering in this connection, as appears in the Cramer patent, that prior to the Diehl patent, the old cross-bar D as shown in the Cramer patent and the old

vertical brace C as shown in that patent were independent and separate constructions.—Turning now to petitioner's device, we find that for the first time in the sewing-machine art:

1. The cross-bar and vertical brace in a sewing machine have been cast together as a unit structure.

2. That the cross-bar and vertical brace have been so cast as to form two loops, in one of which loops is hung the band or driving wheel of the sewing machine and the other of which loops, formed by cross-bar and brace, is hung the treadle of the sewing machine.

3. That the casting of the combined cross-bar and brace to form and compose and include these two loops to carry the moving parts of treadle and band-wheel independent of the machine was a problem applying largely to the casting art, and one of much difficulty.

4. That the treadle of petitioner is hung in an offset in the old common cross-bar, and not in the vertical double brace, the same as if an offset had been made in the old common cross-bar of the respondent's patent, and the treadle hung therein, independent of the cross-brace.

5. That there are no holes whatever in the lower extremities of petitioner's vertical cross-brace to serve as any kind of bearings whatever.

6. That there are no trunnions of any kind, nature or description on petitioner's treadle.

7. That there are no bearings of any kind, nature or description in the vertical cross-brace of petitioner's machine.

The Diehl patent, describing petitioner's mechanism, points out and particularly identifies the purpose, operation and function and result of this particular unit casting carrying both the band-wheel and the treadle as follows:

"My invention relates to an improved construction of

"such sewing machine stand; and its object is to secure a "permanent and reliable support and adjustment for both "the band wheel and treadle and to preserve their respec- "tive relative positions so that they will always co-operate "to produce the best results with the least danger of fric- "tion or binding. . . .

"My invention is shown as applied to a stand adapted "for use in supporting and driving a Singer I. F. sewing- "machine; but I do not confine myself to any particular "form of stand, the essential part *of my invention being "the providing of supports for both the band-wheel and "the treadle, which are integral with the brace, so that "when said band-wheel, with its driving-crank and said "treadle, have been hung within said brace and connected "by a suitable pitman their adjustment to and relationship "with each other are practically permanently secured.*"

That the treadle of your petitioner is mounted in the cross-bar and not in the vertical brace, is made certain, not only by the statements and drawings, but by the fifth claim of the patent which is as follows:

"5. A cross brace for sewing-machine stands, having "at its base a cross-bar, combined with a treadle, *mounted "in said cross-bar, substantially as set forth.*"

In view of these facts and differences, we respectfully submit that no possible infringement can be found.

We are aware that in the opinion of the Court of Appeals, that court has quoted largely from advertising matter of your petitioner, in catalogue form, referring to the advantages of the device of the Diehl patent, and the opinion of the Court of Appeals seems to be a species of special pleading to convince itself that the language of these circular and catalogue advertisements of your petitioner had something to do with the alleged invention of Cramer's patent. It is perfectly evident, in reading these

circular advertisements of your petitioner, that the adjustment and alignment between the band-wheel and treadle is the only adjustment and alignment, spoken of or contemplated by the Diehl patent, and that this adjustment and alignment has an entirely different object and purpose, from that of the Cramer patent, being the adjustment and alignment of two moving parts, band-wheel and treadle, in relation to each other. We respectfully submit that there is no comparison or relationship between the treadle operation of Cramer, its operation and construction, with the asserted alignment and relationship between the band-wheel and treadle, by the regulation of the same in the unit casting of Diehl. In the opinion of the Court of Appeals, a sinister conclusion seems to be drawn against your petitioner in this matter, because in February, 1883, the respondent Cramer wrote your petitioner, calling attention to his patent of a month before and attempting to sell the same, or some rights thereunder, to your petitioner. This fact is not significant, because the respondent Cramer at the same time wrote every other sewing-machine manufacturer in the United States to the same effect, and it is a curious comment upon the conclusions found in the opinion of the Court of Appeals that no sewing-machine manufacturer of the United States, although frequently importuned by Cramer so to do, ever considered his patent of such value or importance as to even negotiate for the use of the same, much less adopt it and use it upon a single machine, during the entire life time of the patent.

There appears also by the opinion of the Court of Appeals that another sinister conclusion is drawn against your petitioner, because your petitioner, several years after the date of the Cramer patent, through its foreman, Diehl, incorporated and put in its machine the Diehl

brace, as shown and protected by his patent, and as herein proceeded against; there is manifestly no relation between the two events, and we respectfully contend that this apparent conclusion is without any foundation of logic or reason, nor finds any support from any fact present, the Diehl construction being a plain confirmation of the petitioner's position, that the Cramer device and patent is and was without value or utility and importance, as to recognition or adoption, by the petitioner or any other sewing-machine manufacturers.

The opinion of the Court of Appeals seems to lay some stress to the disclaimer in the Cramer patent in the statement of the respondent Cramer; he is "Aware that sewing-"machine treadles have already been provided with V-"shaped bearings and I do not claim same as my inven-"tion." There is absolutely no significance to this disclaimer, except that which is found by an examination of file-wrapper and contents, wherein it appears that Cramer when he first went into the Patent Office, supposed that he was the inventor of the V-shaped treadle-bar, for he says in his first application, "My invention consists in "having the ends of the treadle-bar V-shaped to fit in hole "in brace C and, etc." The Patent Office also says that this V-shaped or knife-edge bearing was the invention he desired to claim, and rejected him upon patents, showing the knife-edge bearing on sewing machines. Cramer then stated in substance that V-shaped bearings, *per se,* was not his invention, but V-shaped bearings upon a trunnion, and the particular and peculiar kind of socket or bearing in the brace was his invention; and this is the extent, only, of the intention and meaning of the disclaimer, namely, that Cramer did not claim broadly V-shaped or knife-edge bearings, but that he was the first to use such bearings upon trunnions cast integral with the

treadle and in combination with certain loop-holes through the lower ends of the brace.

We have entered into no discussion of the old art in this case, for the reason that the claim is so distinct and the mechanism so particularized, that the old art could have no bearing upon it, so far as petitioner's device is concerned, as expressed in the case of *McClain* v. *Ortmayer,* 141 U. S., p. 424, where the court says:

" The object of the patent law in requiring the patentee " to 'particularly point out and distinctly claim the part, " improvement or combination which he claims as his in- " vention or discovery,' is not only to secure to him all to " which he is entitled, but to apprise the public of what is " still open to them. The claim is the measure of his right " to relief, and while the specification may be referred to " to limit the claim, it can never be made available to ex- " pand it."

And as in the case of *Keystone Bridge Company* v. *Phoenix Iron Company,* 95 U. S., 274, where the court says:

" When a claim is so explicit, the courts cannot alter or " enlarge it. If the patentees have not claimed the whole " of their invention, and the omission has been the result " of inadvertence, they should have sought to correct the " error by a surrender of their patent and an application " for a reissue. . . . But the courts have no right to " enlarge a patent beyond the scope of its claim as allowed " by the Patent Office, or the Appellate tribunal to which " contested applications are referred. When the terms of " a claim in a patent are clear and distinct (as they always " should be), the patentee, in a suit brought upon the pat- " ent, is bound by it . . . He can claim nothing be- " yond it."

Also in the case of *White* v. *Dunbar*, where the court says:

"The claim is a statutory requirement, prescribed for "the very purpose of making the patentee define precisely "what his invention is; and it is unjust to the public, as "well as an evasion of the law, to construe it in a manner "different from the plain import of its terms."

We understand the rule of law laid down in these decisions to be hereto applied that the respondent Cramer cannot now insist that his first claim shall have a liberal construction, and that the special and peculiar devices described by him in specification and identified by his claims are not necessary constituents of his claim.

If the question of the old art can possibly cut any figure where the patent is so narrow and restricted, so precise and so definite as to its inventions and claims as this Cramer patent, then the Bourdin patent of 1874 shows a treadle hung in the lower depending ends of the cross-brace of a sewing machine and is illustrated upon page 384 of the Record. The old art also is cited in the rejections of the patent in suit and as confining it to the exact and specific mechanism as found in the Record, pages 379 to 398.

We also submit that the fact is well known that the field of invention in the sewing-machine industry, as shown by many reported cases, was restricted at the date of the Cramer patent to an exceedingly narrow compass, and so far as mechanical construction is concerned, left small room for the exercise of the inventive faculty, and certainly confined and restricted the inventor to inventions of a specific and detailed character, and that this fact should be recognized as strongly presumptive of non-infringement of a device differing in any material respect from the patented device. The federal courts of the United States have frequently recognized the crowded condition of the art in

the sewing-machine industry, and decisions where sewing-machine patents have been involved, as, for example, in the case of the *Standard Sewing Machine Company* v. *Leslie*, 78 F. R., 329, the Court of Appeals of the Seventh Circuit, speaking to this exact point, says:

"It is a matter of common knowledge that for many "years sewing machines of many and different modes of "operation have been in use and were upon the market, so "that it is questionable that in the then state of the art "improvements could be effected which could be properly "classed within the domain of inventions have been "deemed other than mechanical equivalents."

The proposition is undisputed that the burden of proof to establish infringement is upon the respondent Cramer.

Seymour v. *Osborne*, 11 Wall., 516.

Imhauser v. *Buerk*, 101 U. S., 647.

And this burden has not been met or lifted by the respondent Cramer as against the petitioner's device, but has been made heavier and intensified and seemingly made impossible, in view of the crowded state of the art, by the fact that the petitioner works under and in accordance with letters patent of its own, the rule of law in this court being under the circumstances that strong and at times conclusive presumptions exist of non-infringement by reason of these facts.

Corning v. *Burden*, 15 Howard, 271.

Boyd v. *Janesville Hay Tool Co.*, 158 U. S., 260.

Miller v. *Manufacturing Co.*, 151 U. S., 208.

For these reasons from the face of the patent itself, and under the authorities, and without reference to the file-wrapper and contents, we submit that the asked instruction of the court to find for petitioner on the ground of non-infringement should have been granted.

Point V.

The judgment is wholly unjustifiable because the respondent Cramer suffered no damage of any kind, character or description whatever by reason of the alleged infringing acts of the petitioner; but upon the contrary, if his patent was of any value or utility, the petitioner furnished a wide market for him therefor.

All testimony regarding the practical exhibition and utilization, if any, by Cramer of his patented device as represented in this record by the deposition of Cramer himself and of his then two young children supposed to be corroborative in part. No witness was called who ever bought of respondent Cramer a sewing machine with his patented brace therein, no witness was called who ever used such a machine, and not witness was called who ever saw such a machine, aside from Cramer and his two children. The respondent Cramer, however, in cross-examination testified and made certain several facts and conditions which makes it impossible that the judgment of the court upon the jury verdict can be recognized or sustained. These facts are:

1. That Cramer never made or had made but two sets of castings of his patented device, one set of castings at Sonora, California, in the year 1881, some five or six in number; the other set at San Francisco, California, in the year 1883, and that both sets of castings did not aggregate more than forty in number.

2. That he never put in to exceed between twenty-five and forty of his patented braces in sewing machines.

3. That his patented sewing-machine braces and treadles were principally put in second-hand machines.

4. That he bought these sewing machines at prices from five to forty dollars and sold them from forty-five to fifty dollars, the machines bought for forty dollars being new machines and sold for ninety, ninety-five and one hundred dollars.

5. That he "got or charged five dollars per machine" more on which he put in his patented braces and treadle.

6. That he had put in and sold out all of his patented braces by the year 1885.

7. That the petitioner never sent into or sold one of its sewing machines having the alleged infringing brace and treadle therein, in the State of California, until the year 1886 or 1887.

The testimony upon these points is clear and comprehensive and there is no contradiction thereof by the respondent Cramer except a general statement that he continued to sell machines with his patented braces "until "they came up there with theirs," a statement seemingly so manifestly absurd and grotesque in view of all of his former admissions as to be without worth of consideration.

We beg leave to here quote to your Honors the testimony of Cramer himself and all of the relevant testimony relating to the manufacture by him of his two sets of braces, not exceeding forty in number, and their incorporation in sewing-machine stands by him. This testimony of Cramer stating all the facts as to this matter we herewith quote in full by questions and answers, as it is simply conclusive to the end and fact that the verdict and judgment in this case is without shadow or ground of sustainment and that the court erred fundamentally and glaringly in refusing the requested instruction of respondent to instruct the jury to find for nominal damages only. We give prominence to this testimony by capitalization because it

is controlling and uncontradicted as the record made by the respondent Cramer himself.

"Q. So YOU COMMENCED SELLING YOUR PATENT IN "1881?

"A. YES, SIR.

"Q. AND YOU CONTINUED TO MANUFACTURE THEM "UNTIL SOME TIME IN 1885, WHEN YOU STOPPED?

"A. YES, THAT IS RIGHT." (Record, p. 83.)

"Q. HOW MANY MACHINES DID YOU SAY YOU SUC- "CEEDED IN SELLING WITH YOUR TREADLE ARRANGED IN IT "WITH THOSE TRUNNIONS AND KNIFE EDGES IN IT?

"A. BETWEEN TWENTY-FIVE AND FORTY.

"Q. How many years did you have them on the mar- "ket?

"A. I had them manufactured, the bulk of them I had "manufactured in 1883 at the O. K. Foundry." (Record, p. 151.)

"Q. When did you first put in any machine such a "combination as is described in your patent? . . .

"A. In 1880 had it all complete.

"Q. When did you first commence SELLING MACHINES "HAVING THAT INVENTION?

"A. IN 1881.

"Q. For how many years did you continue to sell "them?

"A. FROM 1881 UP TO ABOUT 1884, or somewhere "along there, 1884-1-2, or somewhere along there—until "they came up there with theirs.

"Q. YES, BUT IN THAT FOUR YEARS' TIME YOU SOLD "BETWEEN THIRTY-FIVE AND FORTY?

"A. YES, SIR, THAT IS IT." (Record, p. 154.)

"Q. How many sewing machines did you sell all to- "gether during that time, those that did have your pat- "ented device and those that did not?

"A. I could not tell you. I think I sold about—well, "FROM TEN TO EIGHTEEN A MONTH.

"Q. All together?

"A. Yes, sir.

"Q. You averaged about one a month that had this "combination with your patent in, while you were averag- "ing from ten to eighteen a month all together?

"A. I SOLD THEM IN A LITTLE WHILE AFTER I HAD "THEM CAST. IT DID NOT TAKE ME LONG TO SELL THEM. "I did not sell them so many a year." (Record,, p. 155.) . . .

"Q. YOU HAD YOUR PATTERNS MADE SO YOU COULD "GET CASTINGS DURING THAT ENTIRE FOUR YEARS?

"A. Yes, sir.

"Q. You were selling machines at the rate of ten or "eleven a month?

"A. Yes, sir.

"Q. YET IN ALL THAT TIME YOU ONLY SOLD THIRTY- "FIVE OR FORTY MACHINES OF YOUR PATENTED DEVICE?

"A YES, SIR. . . .

"Q. WHEN DID YOU SELL THESE THIRTY-FIVE OR "FORTY MACHINES?

"A. IN 1883 I HAD THOSE MANUFACTURED AT THE O. "K. FOUNDRY ON MISSION STREET, AND THEN I TOOK "THEM UP THERE, AND I DON'T KNOW HOW LONG IT TOOK, "BUT NOT LONG, TO SELL THEM OFF." Record, 158.)

"Q. How many sets of castings for this Cramer com- "bination did you have made in 1883?

"A. THERE WERE THIRTY-FIVE OF FORTY OF THEM "MADE IN 1883.

"Q. How many did you have made before 1883?

"A. OH, I DON'T KNOW. SIX OR SEVEN or somewhere "along there. . . . THE FIRST ONE WAS CAST IN JAN- "UARY, 1881." (Record, 159.)

"Q. Do you know how many sets of castings for this "combination you had made in 1881?

"A. I don't know—four or five—somewhere along there. . . .

"Q. When did you sell those six or seven machines "that you first put the combination in?

"A. I COULD NOT GIVE YOU THE DATE NOW, JUST EX- "ACTLY WHEN.

"Q. ALONG IN WHAT YEARS?

"A. I SOLD THEM THAT YEAR.

"Q. 1881?

"A. YES, SIR. As near as I can remember, I sold "them that year." (Record, p. 160.)

"Q. When did you take any further steps to have any "more castings made?

"A. In 1883 I came to San Francisco, and I had this "lot cast.

"Q. What time in 1883 did you get those castings?

"A. I don't know whether I have got the receipts with "me, or not, but I THINK IT WAS IN THE EARLY PART OF "1883." (Record, p. 161.)

The testimony of Cramer himself shows conclusively that since the year 1885 he never even attempted to sell a sewing machine in which he put a brace with treadle hung as shown in his patent. The truth of this fact appeared several times in his testimony when the direct point was not in his mind, as exhibited by the following questions and answers:

"Q. What was the highest price that you sold one of "these machines for in 1885 or 1886 that did not have "your treadle in it?

"A. I think I was pretty well run out of the business "at that time. I could not tell you. Yes, I was pretty

"well run out of the business. I don't know whether I "sold any that year.

"Q. DID YOU SELL ANY IN THOSE TWO YEARS?

"A. I DON'T BELIEVE I DID.

"Q. Do you know when you sold the last machine that "had your treadle in it?

"A. ABOUT THE YEAR 1884 or 1885."

Nothing can be more certain from the above testimony than that Cramer never put his patented treadle into any sewing machine after the year 1885, and probably not after the year 1884. He may not remember the exact day when he put in the last treadle, but the testimony shows without contradiction that he put the five or six patented treadles that he had cast in 1881 into sewing machines of that year. He swears positively that as to the first set of castings in 1881, *"I sold them that year."* The second set of castings he swears positively he had made at the O. K. Foundry on Mission street, San Francisco, *"in 1883;"* thirty-five or forty in number; that they were cast in the "early part of 1883." And as to these castings he swears positively: *"I sold them in a little while after I "I had them cast. It didn't take me long to sell them."* These are all facts within the knowledge of the witness and all of these statements are proof positive that Cramer did not have and could not put in any one of the thirty-five or forty brace castings, in any sewing machine after the year 1885.

The presence of Cramer's patented brace in his second-hand machines or in others, bore no actual relation to the price he received for the machine.

The simple reading of the testimony of Cramer shows that the prices at which he sold the sewing machines bought by him had nothing to do with the presence of his

patented brace therein, and that his statement twenty years afterwards that "he got or charged five dollars more" for such machines on account of the presence of his patented brace is manifestly untrue from his own testimony, it being entirely evident that if he could have obtained a dollar more for his machines as profits by the presence of his patented brace he would have put them in all machines and made this profit. We herewith quote the testimony of the respondent Cramer in full as to this matter, that shows the absolute correctness of the statements and conclusions that must follow from such testimony:

"Q. What did you pay for these American machines?

"A. All the way, according to the amount I bought at "one time, and the different styles of machines. I bought "American machines—I also bought some second-hand "ones, for which I did not pay more than $5, and from "$5 to $40.

"Q. What would you sell a machine for that you paid "$5 for?

"A. The machine that I bought at $5 was a second-"hand machine. That I repainted and refitted it up, "done perhaps $10 or $15 worth of work on it—I could "not tell you exactly the amount, and I sold it for $45 or "$50, just as I had the chance, and just as the customer "happened to want it, on time or cash. The machines "that I paid $40 for were new machines. I sold them for "$90, and $95, and $100. I should say I don't remem-"ber now the exact price, but I think that is it, $95 or "$100.

"Q. I understood you to say that you sold those ma-"chines that you paid $40 for, for $90 or $95?

"A. Yes, sir." (Record, p. 363.)

The testimony shows, also, that Cramer put his thirty-

five treadles largely in second-hand sewing machines, as follows:

"A. I sold the American as a specialty, and I TRADED "IN SECOND-HAND SEWING MACHINES; most sewing ma- "chine men do that. THOSE I FIXED UP AND PUT ON "PATENT TREADLES AND SOLD THEM—I put on patent "treadles on some of them. IN THAT WAY I SOLD MOST "EVERY KIND OF MACHINE IN THE MARKET, that is, in "trading them and refitting them, THOSE THAT WERE GOOD "MACHINES AND WORTH BEING REFITTED, I FITTED THEM "UP AND SOLD THEM AT SOME PRICE."

Let us see, now, whether we are correct in our statement that as a matter of fact the presence of Cramer's patented device in the few machines in which he put such devices had anything to do with the price at which he sold the machines. The first question and answer that throws any light upon and fixes this fact is upon the direct examination of Mr. Cramer, where he was asked by his counsel as follows (Record, p. 77):

"MR. MILLER: Q. Mr. Cramer, after you got up "your invention, what did you do with regard to putting "it into use and selling machines containing the same?

"A. I had them manufactured, put them into ma- "chines, and I HAVE SOLD THE MACHINES FOR FIVE DOL- "LARS MORE THAN I WOULD, an advance of five dollars on "the patent treadle.

"Q. When did you first commence selling the machine "with the invention in it?

"A. In 1881, the first one I had cast. That was cast, "you know, at the foundry in say, January, 1881.

"Q. What foundry did you have the first one cast at?

"A. At Sonora.

"Q. In the foundry at Sonora?

"A. Yes, sir.

"Q. What did you do with that machine after you had "it finished?

"A. I put the casting onto the machine shortly after- "wards, or put it onto a second-hand machine, and sold it "for—well, I sold that for a big price; I got $50 for it."

Also on page 81 the plaintiff Cramer was asked as follows:

"Now, Mr. Cramer, regarding the prices at which you "sold your machines, did you get any additional price by "reason of having your improvements on the machine, "*over the old machine*?

"A. I GOT $5 MORE; I CHARGED $5 MORE." (Record, p. 81.)

Objection was made to this testimony that was overruled by the court, and exceptions taken. (P. 82.)

Cramer testified further, as follows:

". . . SOME MACHINES I SOLD AT DIFFERENT PRICES "FROM OTHERS. I SOLD THEM ALL THE WAY FROM $65 "TO $90, AND SEVERAL OF THEM UP TO $100." (Record, p. 82.)

"Q. What prices did you have to pay the O. K. Foun- "dry for casting those parts?

"A. They cost me a dollar and a half, all told; that "is, the castings and the painting all together, cost me "1.50."

The acts of the petitioner and of all other sewing machine manufacturers in the State of California furnished an inexhaustible market for the alleged Cramer device, if it was of any value, before and during the whole lifetime of the Cramer patent.

If your Honors will please to remember, that the respondent did not manufacture sewing machines, was simply a dealer in them by purchase and sale, principally

of second-hand machines, and that he only attempted to utilize his invention or device by taking the braces and treadles out of the old machines and substituting his patented device therefor, *it can be readily seen that the only market that Cramer would have for his device would be furnished by sewing machine manufacturers who sent into his state and locality sewing machines with treadles mounted in the machines independently of the cross-brace.*

All the testimony in this case, and confirmed by the testimony of Cramer himself, is that during the lifetime of his patent not only did the petitioner, The Singer Manufacturing Company, but also every one of the other leading sewing machine manufacturers of the United States send to California and occupy the market of California with countless thousands of sewing machines with their treadles hung therein independently of the cross-brace. Cramer himself testified that during the life of his patent in California "the cross-brace containing my patent was "only sold by me and The Singer Company that I know "of," the testimony being that Cramer put his patented treadle in stands already in existence; that "he took the "brace out of those stands and put the new brace and new "treadle in;" and further, that Cramer "had all sorts of "second-hand machines on hand. You could take the legs "of almost any sewing machine; it would not make any "difference what sewing machine the legs belonged to; it "didn't affect the brace or treadle." (Record, p. 298.) Cramer, himself, giving the names upon examination, of all the leading manufacturers of sewing machines in the United States, who during the life of his own patent, sold sewing machines in California to his knowledge and all of them having the treadle hung in the machine independently of the cross-brace. (Record, p. 164.) It needs no argument nor elaboration, then, to show that, as a matter

of fact, during the entire lifetime of the Cramer patent in the State of California there was furnished Cramer a market, and a mine, inexhaustible, for the utilization of the invention and device of his patent in suit if it had been of the slightest value. And that, as a matter of fact, there would have been no market in the State of California for the alleged invention of his patent unless the sewing machine manufacturers of the country had furnished that market by sending sewing machines into that state with treadles hung in the machine independently of the cross-brace. What absolute folly, then, it is to claim or contend that the *"business"* of the respondent Cramer had been ruined or damaged in any way by the petitioner, and what monstrous injustice is perpetrated, not only upon the petitioner, but upon every rule of right and principle of law laid down by the established decisions of this court to justify any finding of damages for the alleged infringement of a patent—to permit the judgment to stand.

Point VI.

The petitioner, the Singer Manufacturing Company, could not have damaged the respondent Cramer's "business" in the installation of his patented braces in the existing machines in the State of California, because the petitioner did not send any sewing machines into the State of California containing the alleged infringing device of Cramer's patent until nearly two years after the abandonment by Cramer of any attempt to place his patented brace in any sewing machine.

It seems impossible to the writer of this brief that any other conclusion can be arrived at upon the reading of the

testimony of the respondent Cramer, than that Cramer had ceased entirely, of necessity, if not from choice, in the incorporation or in attempting to incorporate his patented brace into any sewing machine, second hand or otherwise, by the year 1885. Of course, if the petitioner, The Singer Manufacturing Company, did not send its machines with the alleged infringing brace therein into California until after the year 1885, no damage whatever could have followed to the respondent Cramer by such an act and there would be simply nothing in this record to justify the verdict. The testimony on this point is positive and unequivocal; and after the respondent Cramer had given his testimony as above, the respondent, The Singer Manufacturing Company, then disclosed upon the record, by the testimony of numerous witnesses, that no sewing machine had ever been sent into the State of California containing the Diehl brace or any brace complained of as an infringement of the Cramer patent, until after the month of April, 1886. These facts were proven by memoranda and data that could not be questioned independent of the recollection of any witness, and the facts were further proven that, although the first shipment of the Diehl brace reached San Francisco in April, 1886, it was not put upon the market until the year 1887, by reason of the fact that they had on hand such a large number of the old machines with the old braces thereon.

The fact is also proven beyond dispute that the Diehl brace or the brace found as an infringement by the jury therein was known to all of the employees of the petitioner in California as the "1877 stand." These facts are testified to, and not clouded, by Mr. McMillan, in charge of the stands at that time, and that the first machines were received in April, 1886 (Record, pp. 441-2), Mr. McMillan explaining why the Diehl stands were not put upon the

market until 1887, because "we always worked our old "stock off before starting on a new lot. It was the rule "of the house and is yet." (Record, p. 582.) The same fact was also testified directly and as a matter of corroboration by Charles F. Krantz, a machinist working upon stands in San Francisco; by Henry F. Blanchett, an employee of The Singer Manufacturing Company for twenty-two years (Record, pp. 606-9); Donald MacKenzie, an old employee of the petitioner. (Record, 618.) There is simply no dispute or contradiction of this fact, and how the jury could have found or the judge permitted such finding to stand, as is represented by the verdict, in view of these facts, would seem to be incomprehensible to any fair student of this record. The only possible explanation that can be given for the fact that the court allowed the verdict to stand in the face of this testimony, is the manifestly improbable statement of the respondent Cramer, and a statement whose purpose and intent is perfectly evident and in direct contradiction of the fact, namely, that he did not cease putting his patented treadle into sewing machines until after the petitioner came up there with theirs "and drove him out of business." Manifestly and without question this was a statement of Cramer simply for its effect upon the jury and bore not the slightest relation to the facts in this case. The petitioner did not "come up there" until nearly two years after he had ceased putting in his patented brace in any sewing machine, and he then had no "business" that the respondent or any other sewing machine manufacturer could drive him out of.

Point VII.

This petition for writ of certiorari should be granted because the defense by your petitioner of its agent Fry, in the Cramer-Fry suit, tried before and decided by his Honor Judge McKenna by an instruction to the jury to find for the defendant upon the ground of non-infringement—was an open defense made by your petitioner wherein your petitioner paid all costs of such litigation and counsel fees, and such facts were known by respondent Cramer's counsel in that case, as appears by positive proof shown and offered in this case.

As appears in detail by the petition filed herein, in the trial of the case before his Honor Judge Beatty, his Honor instructed the jury to find for the defendant primarily upon the ground that the subject-matter was *res adjudicata* as to this matter against your petitioner for the reason that the petitioner defended the case of respondent Cramer against its agent Fry in the trial before Judge McKenna, paid all the expenses of that litigation, counsel and court fees. This finding upon the part of Judge Beatty on appeal to the United States Circuit Court of Appeals for the Ninth Circuit was reversed upon the ground that such defense, although made by the petitioner, was not an open defense known to the respondent Cramer, the case being reported in Federal Reporter.

So strong, however, was the belief of the petitioner that the record in that trial upon its face did disclose an open and notorious defense of its agent Fry that a petition for writ of certiorari was lodged in this court at the October Term, 1898, but the petition was opposed upon the ground that there had been no final trial of the case, that it was

reversed and remanded for that purpose by the Court of Appeals and the petition would not lie in this court under these circumstances. The petition was denied without opinion given and we suppose by reason of the above objection made. In the present case, however, in addition to the apparently obvious fact disclosed by the record on its face that the defense by petitioner of its agent Fry was an open defense and known and must have been known to the respondent Cramer, there appears in this record by positive testimony given and proof offered to the same effect that if the respondent Cramer did not personally know of the defense of Fry by your petitioner in that case, that his counsel who instigated and conducted the suit did know it from start to finish and tried the case solely upon the theory and for the reason that your petitioner was back of the suit, and solely for reason of the effect and binding character of that litigation upon the petitioner, if successful. The Court of Appeals, as shown by their decision, refused to reverse the finding of the court, and verdict instruction to the jury upon this point, and refused to send back the case by reason of the error upon the part of the trial judge in refusing to permit evidence of the knowledge of the respondent Cramer's counsel of the fact of the petitioner being back of its agent Fry, because so far as the writer of this brief can ascertain from the opinion, that the petitioner had at one time challenged the jurisdiction of the court, when sued jointly with its agent Fry, and upon motion was dismissed therefrom; and upon the ground that there was no error upon the trial judge in refusing testimony offered to show, or tending to show, the knowledge of the respondent Cramer's counsel of petitioner's defense of its agent.

There is is no conflict in the record whatever upon the

following conditions and statements of fact established by testimony:

(1) That the petitioner paid all the expenses and costs, court and counsel, of every kind and description of petitioner's agent Fry in the Cramer-Fry litigation. (Kierce dep., 628; Fry dep., 635-6.)

(2) That the Eastern expert, Mr. Brevort, who testified in behalf of the defense in the Cramer-Fry suit was in the employment of the petitioner. (Record 401.)

(3) That the Eastern counsel for the petitioner came to San Francisco and assisted in the conduct of the trial of *Cramer* v. *Fry* for the defense.

The trial judge, however, refused to admit any testimony showing, or tending to show, the knowledge of Cramer's counsel that the petitioner was back of its agent Fry in that litigation and was conducting the defense, although convincing proof was offered to establish this fact, the Court of Appeals sustaining such refusal. (Kierce dep., Record 622-3; Record 642-7.) The trial judge instructing the jury that this fact of defense must be *"known "to the plaintiff Cramer at the trial of said case."* (Record, p. 793.) And the Court of Appeals sustained such finding.

Respondent Cramer's bare denial that he did not know that petitioner was back of its agent Fry in the Cramer-Fry litigation, contradicted by all of the facts and his other testimony.

The respondent Cramer sees fit now to deny that he knew the petitioner was back of its agent Fry in that suit, but his testimony, when his attention was not directed particularly to this point, speaks otherwise, as for example, Record, p. 717:

"Q. How came you then, to join the Singer Company "with Mr. Fry when you brought that suit?

"A. *You must ask the attorneys about that, how that "happened. I don't know how—he was in their office in "the former trial of Cramer and the Singer Company, "they were joined together, and I presume that the attor- "neys thought that it would do that time, too. That is "what I imagine. I don't know anything about it. But "I heard the attorneys talk that time—that they would "take the two in together.*"

Again, illustrating the kind of knowledge that Cramer supposed he must possess as to this matter and his conception of the sanctity of his oath regarding this same matter, he having sworn in his complaint filed herein, in several places, that Fry was the agent of the petitioner and based his suit upon that fact, testified as follows (Record, p. 718):

"Q. Do you mean to say that you did not know when "you brought that suit *that Mr. Fry was the agent of the "Singer Company?*

"A. *When it comes to right knowing, where could I "know; where is my authority for knowing?*

"Q. The question is, did you know or not?

"A. *I did not know.*"

The respondent Cramer also stating in his deposition certain facts that show conclusively that he was after your petitioner and not Fry in that litigation and knew the petitioner was back of its agent, as follows: "*When I got "through with Mr. Fry I would go to New Jersey and sue "the Singer Company.*" (Record, 720.)

We respectfully submit that under the well settled authorities it made no difference whether or not the respondent Cramer knew the petitioner was back of its agent Fry,

if his counsel knew it. The law of principal and agent applies to the relation of attorney and client.

Weeks and Attorneys at Law, p. 441.

Wharton on Agency, Sec. 580, and authorities cited.

Directly bearing upon this point also is the federal enactment, Sec. 35 of the Judiciary Act, which provides that where a defendant employs an attorney of the court, "the "attorney stands in his place until such attorney is "changed or discharged, as he has the exclusive control of "the conduct and management of the suit." The law upon the subject is concisely stated in the opinion of Mr. Justice Bradley in *Distilled Spirits cases*, 11 Wall., 367:

"The general rule that a principal is bound by the "knowledge of his agent is based on the principle of law "that it is the agent's duty to communicate to his princi- "pal the knowledge which he has respecting the subject- "matter of negotiations, and the presumption that he will "perform that duty. . . .

"This rule does not depend in either case upon the fact "that the agent *has* disclosed the knowledge or informa- "tion to his principal; subject to the exceptions named, "the law conclusively presumes that he has done so and "charges the principal accordingly."

There is no doubt under the authorities that if the petitioner was back of its agent Fry, or even contributed to his defense, the petitioner would be bound by the judgment therein and thereby, the rule upon this subject being found in representative cases at the Circuit of *The Eagle Mfg. Co.* v. *Miller*, 41 F. R., 351: *The David Bradley Mfg. Co.* v. *Mfg. Co.*, 57 F. R., 980.

The principle recognized at the Circuit as to this matter seems to be founded upon decisions of this court which

appear to go much farther in principle and application than heretofore made at the Circuit. That principle is that where suit is brought against a party who should be defended by another or third party, even jointly with the party sued, and such party has notice of such suit, it is the duty of such third party to defend the party sued, and that he is bound by the judgment against the party whose duty it was for him to defend.

The case of *Robbins* v. *City of Chicago*, 4 Wall., 657, seems to us to lay down the principle upon which all of these cases are founded. In that case the party sued the City of Chicago for injuries growing out of certain improvements being made in the street, in which action the abutting property owner was jointly liable with the city. The abutting property owner did not appear at the trial, nor was he a party thereto, but he knew that the suit was pending and he might have taken part in it, the court holding that he was bound by the judgment recovered against the city and could not in another action dispute its validity.

To the same effect is the case of *Lovejoy* v. *Murray*, 3 Wall., p. 1. As disclosed by that case, an action of ejectment had been brought, and the party claiming the attached property gave an indemnity bond, subsequently the sheriff was sued for disposing of the property in pursuance of his bond, and a judgment was recovered against him. This court in this case held that it was the privilege and the duty of the party who gave the bond to defend the suit against the sheriff, and that he should not enter into a new suit to contest the validity of the judgment recovered against the sheriff, but was bound by it.

In these cases it seems to us clearly that this court has announced the principle that where it is the duty of a party who has the right to come into an action and defend it and fails to do so, knowing the pendency of the action

and its conduct, he is bound by the judgments recovered, and that the same principle should be applied to the facts and conditions disclosed by this record and as applied to your petitioner.

We respectfully submit, therefore, that it was grave error to refuse admission of testimony directly or indirectly showing the knowledge of respondent Cramer's counsel of petitioner's defense of its agent Fry, and that it was grave error to refuse to instruct the jury to find for the defendant under the undisputed facts as to this whole matter also.

Point VIII.

The petition should be granted because the whole record in this case shows that there is absent from the entire testimony, given by the respondent Cramer, any reliable proof that he has suffered any damage by reason of any act of the petitioner; and that upon the face of all of the proof given by him, petitioner's requested instruction to the jury to return a verdict for nominal damages should have been given, if technical infringement should be found to exist.

This is not a case where the profits recoverable against an infringer of a patent is a measure of damages. If there were any such profits, and proven, they might establish a measure of damages. (*Mowry* v. *Whitney,* 14 Wall., 620; *Root* v. *Railway case,* 105 U. S., 198.) And even where profits may be considered the measure of damages, it is the profits that an infringer actually has made and not which can be proven that he might have made, which is to govern. (*Burdell* v. *Dening et al.,* 92 U. S., 220.) As has been seen, Cramer's testimony is in sub-

stance and effect, only that he was a dealer in sewing machines, second-hand and new. That covering a period of five years, 1881 to 1885, he took out of such machines the braces he found therein with treadles, and put in his own braces, not to exceed forty in number, and that he paid from $5 to $50 for the machines, old and new, and sold them from $45 to $100. (Record, pp. 77 and 363.) His only testimony, that even remotely relates to any added value of the machine by putting in his patented treadle, is found in two statements as follows (Record, p. 77):

"MR. MILLER: Q. Mr. Cramer, after you got up "your invention, what did you do with regard to putting "it into use and selling machines containing the same?

"A. I had them manufactured, put them into ma- "chines, *and I have sold the machines for $5 more than I "would, an advance of $5 on the patented treadle.*"

Also, on Record, p. 81, the following question and answer:

"Now, Mr. Cramer, regarding the prices at which you "sold your machines, did you get any additional price by "reason of having your improvements on the machine, "over the old machine?

"A. I GOT $5 MORE; I CHARGED $5 MORE."

We respectfully submit that such testimony is a long way from proving the fact of any added value to any sewing machine, by placing therein by respondent Cramer of his patented treadle. As before stated, no person is called who ever bought or sold or used a machine with Cramer's patented treadle therein. The difference in price at which he bought all of these sewing machines and at which he sold such machines after his patented treadle was placed therein, shows that the presence of the patented treadle in the machine had nothing to do with the price of its sale, and the testimony of Cramer, showing that dur-

ing all those years he sold sewing machines bought by him, without putting in his patented treadle, from fifteen to eighteen per month.

No rule or principle of law is better settled in this court than that damages must be proved and not guessed at (*Philp* v. *Nock*, 17 Wall., 462); and that the burden of proof rests upon the respondent. (*Blake* v. *Robertson*, 94 U. S., 733.) The case in this court of *Boesch* v. *DeGraff*, 133 U. S., 705, seems to be so applicable as to its facts and conditions, to the case at bar, that we here quote from the same with our own italics, as to what we deem particularly relevant application thereof:

"Where the patentee granted no license, and had no es-
"tablished license fee, but supplied the demand himself,
"and was able to do so, an enforced reduction of price is
"a proper item of damages, if proven by satisfactory evi-
"dence. *Yale Lock Mfg. Co.* v. *Sargent*, 117 U. S. 356.
"The damages must be actual damages, but where the pat-
"ented feature is the essential element of the machine or
"article, as in the case just cited, if such damages can be
"ascertained they may be awarded. *When, however, a*
"*plaintiff seeks to recover because he has been compelled*
"*to lower his prices to compete with an infringing defend-*
"*ant, he must show that his reduction in prices was due*
"SOLELY *to the acts of the defendant, or to what extent it*
"*was due to such acts.* *Cornely* v. *Marckwald*, 131 U. S.
"159. There must be some data by which the actual dam-
"ages may be calculated. *New York* v. *Ransom*, 23
"How., 487; *Rude* v. *Westcott*, 130 U. S. 152. . . .
"Conceding that as Graff granted no licenses, and had no
"established license fee, but supplied the demand for the
"burner himself, and that, therefore, if he was compelled
"to lower the price by the infringement he would recover
"for the loss thus sustained, does the evidence satisfac-

" torily establish that the reduction in prices was due solely " to the acts of the defendants in infringing? *The opin-* " *ion of Mr. and Mrs. Graff to that effect is not sufficient.*"

Applying the language of the court to the facts in this case, it would seem that the opinion of the respondent Cramer is not sufficient; and the respondent Cramer never having manufactured or put into sewing machines his patented brace to exceed forty in number during the period of five years, his statement that the petitioner drove him out of "business" is a mere opinion and represents an impossible condition, especially when we remember that the respondent had gone out of "business" two years prior to the date of the appearance of the petitioner's machines in any part of California.

Over and beyond all this, there are two claims to Cramer's patent in suit, representing distinct and separate improvements and asserted inventions, each claim must be considered as a separate patent, and it is admitted that respondent's machine does not infringe the second claim—and there is no proof that the first claim in itself is of any value, separated from the second claim.

We respectfully submit that the instruction to find for nominal damages only should have been given upon the point alone that there being two claims to Cramer's patent, only one of them alleged to be infringed and no proof as to the value of the devices of the first claim or distinction from the devices of the second claim, and the proof being that the forty braces of Cramer made in the five years contained the inventions of both claims—the instruction should have been given as to nominal damages only, based on rule that where there are two claims in a patent, and only one relied upon, the proof must show distinctly and precisely the damages as to the relied-upon claim. *Parks*

v. *Booth,* 102 U. S., 96; *McCreary* v. *Canal Co.,* 141 U. S., 467; *Seymour* v. *McCormick,* 16 How., 485; *Garrettson* v. *Clark,* 111 U. S., 121; *Buerk* v. *Imhauser* 101 U. S., 664; *Black* v. *Thorne,* 111 U. S., 124.

Point IX.

The petition should be granted because the hanging of a sewing machine treadle in a vertical cross-brace in itself is without practical value, advantage or utility, and manifestly is without patentable novelty.

The testimony in this case shows, both by the record and the petition filed herein, that the hanging by your petitioner of its treadle in offsets in its cross-bar allied by a casting with the unit vertical double brace is a mere accident or incident of construction having for its object only a fixed alignment between the treadle and band-wheel in a cast unit structure separate and distinct from the frame of the machine. It is perfectly manifest from this record that the treadle of respondent's would have been hung in the legs of the sewing machine to this day as such treadle had been hung from the beginning, and as such treadle is hung by every sewing-machine manufacturer in the United States, except for the ability of the petitioner to cast the apparently slight double brace and cross-bar into loop form in a composite concrete structure, hanging the treadle in one loop and the band-wheel in another for perfect alignment. The respondent Cramer himself testifies to his familiarities with all of the leading sewing-machine manufacturers of the United States and that all of them hang their treadle in the legs of the machine and none of them in the

brace (Record, p. 164), and that only he and the respondent ever hung a treadle out of the legs of the machine. The petition filed herein shows that although two years have expired since the date of the grant of this patent, no sewing-machine manufacturer in the United States has ever changed his mode of hanging his treadle in the legs of the machine; and the testimony of a large number of witnesses representing different manufacturers in the United States in this record is clear to the point that the device exhibited by the Cramer patent is of no value and that the place to hang a sewing-machine treadle is in the legs of the machine. (Record, pp. 502, 547, 565.)

We respectfully submit in view of these admitted and proven facts that there is no reliable proof in this record that there is any value or utility to the device of the respondent Cramer's patent and that there is abundant proof that no sewing-machine manufacturer in the United States during its lifetime or since ever would adopt or use it, although importuned by the respondent Cramer so to do, and that there is good reasons given in the various depositions constituting this record therefor; and that from these proven facts the alleged invention of the respondent Cramer is invalid and without patentable novelty or invention.

Conclusion.

Without further elaboration and without attempting to go into all of those corroborating and collateral circumstances and facts in this record that would bear out and confirm the statements and propositions here presented, and fearing that already this brief in support of the petition has gone beyond an expected presentation of the subject-matter necessary for the understanding of the court

of the controlling propositions determining the granting of the writ; and justifying only the length of this brief in the light of the questions at issue and the wrong and injustice believed to have been done the petitioner; we respectfully submit that it would be simple justice, for this court to grant this petition and give your petitioner a final day in court to determine the right or wrong of the acts committed, believing that such opportunity of presentation will demonstrate and make manifest to your Honors the unqualified hardship, wrong and injustice that has been done to your Petitioner and will follow forever, without redress, from a refusal to grant this Petition.

Respectfully submitted,

CHARLES K. OFFIELD.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

No. 215.

SINGER MANUFACTURING COMPANY,
Petitioner.

vs.

HERMAN CRAMER,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF AND ARGUMENT FOR PETITIONER

BY

CHARLES K. OFFIELD,
CHARLES C. LINTHICUM.

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Indisputably and admittedly, each of the thirty-five or forty machines sold by Cramer with his brace and treadle between the years 1881 and 1885 contained the devices of the second claim of his patent, and there is simply no testimony showing the value of the mechanism of this claim, or that any one of the thirty-five or forty sewing machines would have been sold without the presence of the devices of the second claim; all record evidence is clearly that Cramer's devices without this second claim are without value. 122

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

No. 215.

SINGER MANUFACTURING COMPANY, Petitioner.
vs.
HERMAN CRAMER, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF AND ARGUMENT FOR PETITIONER

BY
CHARLES K. OFFIELD,
CHARLES C. LINTHICUM.

This cause comes to this court on certiorari. A petition for this writ was lodged in this court December 31st, 1901; the certoriari allowed January 21st, 1902, and return filed February 10th, 1902. The general grounds for the writ were set forth in the petition as follows:

(1) A direct conflict and variance of decision and result between the several judges sitting in the United States Circuit Court for the Ninth Circuit, and at the circuit; and between the judges of that circuit sitting in the Circuit Court of Appeals for that circuit; the entire subject-matter at issue and contest being the validity of cer-

tain letters patent issued to one Herman Cramer, respondent, dated January 30th, 1883, and No. 271,426, for an alleged improvement in Sewing Machine Treadles, and the denial of infringement thereof by petitioner. (2) That the petitioner has openly conducted and defended a suit by respondent defendant in error, in the United States Circuit Court for the Northern District of California, against its agent, Fry, brought upon this same patent, and against the identical alleged infringing structure in this action, and so known to respondent's trial counsel therein. (3) That by any legal construction of said Cramer patent upon its face, there can be no found infringement thereof by petitoner's structure. (4) That the Cramer patent rightfully construed and read with the file-wrapper and contents, assures the non-infringement thereof by petitioner's structure. (5) That there is absent from this record any reliable testimony establishing any damage, or measure of damage, by respondent by reason of any asserted infringing act. (6) That the respondent Cramer has, since the decision of the Court of Appeals for the Ninth Circuit, in the above case, begun separate independent suits against petitioner in a number of the Circuit Courts, for the several districts, in the United States, against the same precise structure as an infringement involved in this action, and is threatening to bring such suits in every remaining district and circuit of the United States, thereby involving your petitioner in litigation as to the same subject-matter in every circuit and district in the United States; whereas, all matters could be settled and disposed of by a single suit, and upon this petition.

The above is the substance of the petition presented to this Honorable Court, and which was promptly allowed.

No opinion was filed, or memorandum, upon the allow-

ance of the petition, and it does not appear upon which of the above grounds of assertion the petition was granted, or whether upon such grounds jointly or severally. However this fact may be, the case is now before this court for final review and determination, and, we take it, present for discussion and disposition as broadly as if present before this court upon writ of error, prior to the statutory organization of the nine Courts of Appeal, at least the case must be here disposed of upon the record filed.

Statement of facts antecedent to petition.

This is an action at law, brought for an alleged infringement of the above Cramer patent of January 30th, 1883, No. 271,426, for an alleged "Improved Sewing Machine Treadle;" the application for such letters patent was filed May 25th, 1882. (Rec., p. 33.)

The Singer Manufacturing Company, petitioner, is the manufacturer of Sewing Machine Stands and Treadles under certain letters patent granted Philip Diehl, No. 306,469, under date of October 14th, 1884, for a new and useful improvement in Sewing Machine Stands and Treadles, application therefor being filed May 29th, 1884. (Rec., p. 85.)

All of the sewing machines which have ever been made or sold by the petitioner, which are claimed to be an infringement in any way of the Cramer patent, were made in accordance with the drawings and specifications of this Diehl patent, and except the manufacture and sale by the petitioner of stands and treadles constructed in exact accordance with this Diehl patent, and in the manner therein described, it is not claimed that the petitioner or its agent, Fry, has done anything that can be contended, is or can be, an infringement of the Cramer

patent. It has never been contended by Cramer that the petitioner or its agent, Fry, has infringed any other than the first claim of such patent. (Rec., p. 36.)

Prior to the present action at law, a suit was begun at law by the respondent Cramer in the United States Circuit Court for the Northern District of California, for infringement of the patent in question, and against the precise device here proceeded against as infringement. This suit was filed May 31st, 1893, against petitioner, and its agent Willis B. Fry, for selling sewing machines containing the Diehl stands and treadles for petitioner.

Upon the facts appearing on the face of the complaint the suit was dismissed against your petitioner, the Singer Company, under the law as it then stood, and the case proceeded against its agent, Fry, with the same counsel of record.

This case was tried before his Honor Judge McKenna, beginning upon April 12th, 1895, and occupying something over a week in duration of time. At the close of the testimony the Singer Company asked the court to instruct the jury to find for defendant, and the court so granted such instruction, and as appears by his opinion, based upon the ground that under any rightful construction of the Cramer patent, the Diehl stand and treadle was not an infringement thereof; and judgment was thereupon entered for defendant. No further action of any kind was ever had or taken in that case. The judgment there entered remains to this day in full force and effect, and stands as a final judgment. The case is fully reported in 68 Fed. Rep., 201, the entire Cramer patent in suit being there present, as to drawings, specifications, and claims, and a drawing of the Diehl patent, representing the alleged infringing structure, being also reproduced and printed in full.

The petitioner, the Singer Company, alone defended this action against its agent Fry. Petitioner's answer in the present case sets up the judgment in the case against its agent Fry as a bar to the prosecution of this suit. The answer also discloses and sets forth the usual defenses in a patent case viz: Antecedent relative matter; want of patentability; denial of infringement; and the denial that the defendant in error, Cramer, has suffered any damage or loss of any description, etc. This suit was begun against petitioner, the Singer Company, upon the 8th day of October, 1896; its agent Fry was not joined as a party defendant in this action. The first trial of the present case was before his Honor Judge James H. Beatty, of the Idaho District, sitting as Circuit Judge in the Northern District of California. That trial also extended over a week's duration of time, and at the close of the testimony, the court instructed the jury to find for the defendant upon the ground that the petitioner, the Singer Company, alone conducted the defense in the suit against its agent Fry, in the suit above indicated; that the only act and proof of infringement in that case was the presence of the Diehl stand and its sale; and the only act of infringement in this case was the admitted fact of the manufacture and sale by petitioner of this stand and accompanying treadle; and that the petitioner was protected by, and would have been bound by, any judgment in that case. (Rec., p. 13.)

Judge Beatty, however, went further and stated that had he not decided the case upon the rule of law, as above applied by him, he would have given the instruction to find for defendant, the Singer Company, upon exactly the same ground as his Honor Judge McKenna, and would have so given it independent of, and uninfluenced by, that

decision. (Petition for Writ, pp. 6-7.) The case tried before his Honor Judge Beatty was taken to the Court of Appeals for the Ninth Circuit by the defendant in error, Cramer, and that court reversed the judgment upon the sole ground that it had not been sufficiently proven, and did not sufficiently appear upon record that the defense made by the petitioner, the Singer Company, in the case against its agent Fry, was an open defense, known to Cramer. The Court of Appeals made no reference whatever to the merits of the case other than upon this one point, the decision of the court being published in 93 Fed. Rep., 630. There was no discussion, even, as to any other prposition or defense in the record, other than as to whether or not the judgment of his Honor Judge McKenna was *res judicata* as to the Singer Company. Immediately upon the filing of this opinion, the petitioner, the Singer Company, applied to this court for writ of certiorari, upon the ground that it appeared plainly upon the face of the record that the defense of its agent Fry was an open, and not a secret defense. This petition was denied by this court without opinion upon October 30, 1899. (175 U. S., 725.)

The case was then returned by mandate to the Circuit Court, and was again, and for the third time, tried at the circuit, by jury, in the months of March and April, 1900, with the resulting judgment in favor of respondent Cramer for $12,456.00. The Singer Company then took the case by writ of error to the Court of Appeals for the Ninth Circuit, upon various exceptions taken and entered at the trial at the circuit. The case came on for hearing before the Court of Appeals for the Ninth Circuit, and shortly thereafter the judgment was affirmed by that court. (Rec., p. 464.) A petition for rehearing was filed

in the Circuit Court of Appeals for the Ninth Circuit, and same was denied. (Rec., p. 465.) Thereupon, the petitioner, the Singer Company, filed its petition for writ of certiorari, upon the 31st day of December, 1901, and upon the 21st day of January, 1902, it was allowed by this Honorable Court. (Rec., p. 467.)

Classification and identification of exceptions and instructions given and refused.

Sixty-eight exceptions were taken in all at the trial; were contained and present in the record below, and are here present in this court. Five of these exceptions were taken to the overruled defendant's objections to asserted relevant testimony of petitioner's witnesses. Five exceptions were taken to excluded testimony offered by petitioner. Exceptions 13 to 56 inclusive were taken to the refusal of the court to give instructions requested by the petitioner. These exceptions appear in full in Record, between pages 400 and 427. Those exceptions which were taken to the giving of certain instructions of the court to the jury, constitute the remaining exceptions appearing in this record, and appear in full on pages 427 to 432 inclusive.

The instructions requested by the petitioner, the Singer Company, and refused by the court, appear in full on record pages above referred to. Those instructions that were excepted to by the petitioner, the Singer Company, and given by the court, are found in record between pages 427 and 432.

The lengthy and complete charge of the learned trial judge at the circuit, appears in full on Record pages 417 to 427, and the petitioner's assignments of error, pages 434 to 452 inclusive.

Upon the presentation of this case we beg leave to rely upon all of the errors alleged jointly and severally, although in the presentation of the case we shall present them, massed or in groups, as bearing upon two or three salient and controlling rules of right and decision in this case and so relied upon by petitioner. We believe it will be more satisfactory to court and counsel to hereafter for the most part speak of the plaintiff in error as the Singer Company and the defendant in error as Cramer.

The subject-matters of refused instructions, eleventh and twelfth, represent and stand for the initial strain of the case.

At the close of the defendant in error's testimony, and at the close of the testimony of the plaintiff in error (petitioner), petitioner's counsel moved the court to instruct the jury to find and return a verdict for the defendant in error, upon the ground of non-infringement (Rec., p. 394), as represented by the eleventh refused instruction. Petitioner (plaintiff in error) then requested the court to instruct the jury that "under the construction of the patent as given by the court no infringement exists, and your verdict must be for the defendant." The court refused to give this instruction, and such refusal represents the twelfth exception. (Rec., p. 400.)

Under any rightful construction of the Cramer patent as to the first sole relied upon claim, both of these instructions should have been given.

There is such identity as to subject-matter between these two exceptions 11 and 12 that they can be discussed, and indeed should be discussed and presented at the same

time in the same argument. Such cotemporaneous discussion seems to be not only proper as a labor-saving proceeding for court and counsel, but also tends to clearness of understanding. Manifestly, also, as to one of the exceptions, it will be necessary to refer to much of the testimony present in the record, to establish the rightfulness of the exception. Again, these exceptions are first presented for discussion because it is clear that if your Honors find them rightful and well taken, such finding will end the case, and it will be no manner of consequence whether the other exceptions are material or not.

The proposition is axiomatic, as we understand it, that the construction of a patent is solely a matter of law for the court.

The rule of construction is no wise different, we take it, in an action at law upon a patent before a jury, than in an equity case before a court. In the case of *Heald* v. *Rice*, 104 U. S., 737, we find the rule stated by this court, as follows:

> "If it appears from the face of the instrument that explicit evidence is not needed to explain terms of law, or to apply the descriptions to the subject matter, so that the court is able from mere comparison to see what are the inventions described in it, and from such comparing that they are not the same but different, *then the question of identity is one of pure construction and not of evidence, and consequently is a matter of law with the court, without any auxiliary matter of fact to be passed upon by a jury if the action be at law.*"

The rightful and only construction that we believe can be given to this first claim, on the face of the patent itself—the rule of law as to such construction, and the duty of the patentee as to statement of invention and claim in his patent.

As a condition precedent to the granting of the patent, and as a binding rule upon the patentee thereafter, and as a protection to the public during the life of the patent, Section 4888 of the Revised Statutes is authoritative and controlling, such section being as follows:

> "Sec. 4888. Before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor, in writing, to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound and use the same; and in case of a machine he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. The specification and claim shall be signed by the inventor and attested by two witnesses."

This section is substantially identical with the section of which it is a revision (Act of 1836) except that the Act of 1836 provided that the inventor "in case of any machine shall fully explain the principles and the *several modes* in which he contemplated the application of that principle, or character, by which it may be distinguished from other inventions."

It will be seen that the Section 4888 centralizes and makes much more certain the obligation of the inventor as to the public, in this: That instead of generalizing and stating several modes in which he contemplated the application of the principle, etc., he is now required in the case of a machine, after explaining the principle thereof, to explain the *"best mode"* in which he contemplates applying such principle.

It may seem somewhat elementary to quote this clause of the Revised Statutes, but in view of the decision of the Court of Appeals, to which the writ is directed, we deem it at least precaution to recite the fundamental provision by reason of which alone this patent exists.

The courts at the several circuits have at times been somewhat lax in their construction and application of Section 4888, and its binding effect upon patentees. As we read the decisions of this court, however, from the first to the last decision, patentees have been held rigidly to this clause of enactment, and the effect thereof, in the statement of their inventions and the statement of their claims. As we read the cases also there is no class of cases or patents in which this court has more rigidly enforced and applied Section 4888 than in those cases, and concerning those patents, which relate to "*improvements*" and "*combinations*" forming the subject-matter of letters patent.

We beg leave to refer to two or three decisions of this court bearing directly upon this subject, and have taken the liberty of italicizing certain statements appearing therein, for more particular emphasis in distinguishment from other statements in the quotation, and from parts hereafter quoted relating to analogous subject-matter to be discussed.

As early as the year 1818 Chief Justice Marshall of this court, in the case of *Evan* v. *Heaton,* 3 Wheaton, 454, speaking as to this precise subject-matter says:

> "In all cases where *his claim is for an improvement on a machine, it will be incumbent upon him to show the extent of his improvement so that a person understanding the subject may comprehend distinctly in what it consists.*"

Later, in the case of *Grant* v. *Raymond,* 6 Peters, 248, this great Chief Justice thus states the rule of law:

> "This case affirms the principle that a failure on the part of the patentee in those prerequisites of the act which authorize a patent, is a bar to a recovery in an action for its infringement, and that the validity of this defense does not depend on the invention of the inventor, but is a legal inference upon his conduct."

Again, in the case of *Gill* v. *Wells,* 22 Wall.. 25, this court says:

> "Where the ingredients are all old, the invention in such a case consists entirely in the combination, and the requirement of the Patent Act that the invention shall be fully and exactly described applies with as much force to such an invention as to any other class, because if not fulfilled all three of the great ends intended to be accomplished by that requirement would be defeated. They are as follows: (1) That the Government may know what they have granted and what will become public property when the term of the monopoly expires. (2) That. licensed persons desiring to practice the invention may know, during the term, how to make, construct, and use the invention. (3) *That other inventors may know what part of the field of invention is unoccupied. Purposes such as these are of great importance in every case, but the fulfillment of them is never more necessary than when such inquiries arise in respect to a patent for a machine which consists of a combination of*

old ingredients. Patents of that kind are much more numerous than any other, and consequently it is of the greatest importance that the description of the combination, which is the invention, should be full, clear, concise, and exact."

Let us now see, in the light of these decisions, what construction must be put upon the Cramer patent *on the face of the patent itself,* and as there defined and made certain by the patentee himself.

The Cramer patent occupies two printed pages of the Record (33-34), with a single sheet of drawings oppositely facing and immediately preceding page 33. The patentee, Cramer, in his opening statement, says that he has "invented a new and improved Sewing Machine Treadle," and then states that his entire patent, as to drawings and specifications "is a full, clear, and exact description of the same." The patentee immediately thereafter speaking, particularly and with exactness as to his invention, says:

> "My invention relates to *improvements in the bearings of sewing machine treadles;* and has for its object to provide means, first, to keep the treadle-bearings rigidly in line and at a fixed distance apart to avoid friction, and second, to make its movement in use noiseless."

And then that there can be no possible mistake as to in what, and to what his invention relates and consists, after stating the general objects thereof as above, he says:

> *"To this end my invention consists in the construction and combination of parts hereinafter fully described and claimed, reference being had to the accompanying drawings, etc."*

Figure 1 of the drawings the patentee says is "a perspective view of a portion of a sewing machine, showing my invention." It will be noticed that in Figure 1 the

parts relatng to the invention upon the right side of the drawing are broken away so as to show itemized and in detail the invention of the patentee Cramer, and that the patentee was not entirely correct in saying that "Figure 1 is a perspective view of a portion of a sewing machine" showing his invention. Figure 2, however, of the drawings does show the invention of the patentee Cramer as he defines it, namely: "My invention relates to *improvements in the bearings* of sewing machine treadles."

Cramer says in his patent that the "Figure 2 is a transverse vertical section through *one bearing* of the treadle."

The patentee then goes on to describe particularly the construction and combination of parts in which, as above stated, he declares his invention consists, identifying the same by lettered parts, and particularly descriptive matter. He says:

> "*A represents the treadle* provided with the usual pitman-connection by which to run the sewing machine wheel. *B represents the two trunnions, cast as a portion of the treadle and extending from its sides into loop-holes in the common cast-iron cross-brace C. These trunnions are sharpened to an edge or corner along their lower sides, and the lower end of the loop-hole is hollowed to an angle more obtuse than the edge of the trunnion, to serve as a bearing for the same and permit the rocking motion common to treadles.* C represents the usual cast-iron double brace connecting the two end legs diagonally in a plane generally vertical. The lower ends of this brace are secured directly to the web of the legs by bolts *d*, and *for convenience and strength I make the two ends of the common cross-bar D, serve as these bolts.* The upper ends of the brace are secured, as usual, either to the web of the legs or to the table of the machine, near the legs."

It will be noticed that this last description professes to be simply a statement of a common and well-known form

of parts connecting the two legs of the sewing machine, and the old common cross-bar called "D," found in every sewing machine; the patentee suggesting that the old vertical brace can be held in position and place by utilizing the old cross-bar of the machine as a bolt.

Keeping in mind that the patentee has said that his invetion relates to "improvements in the bearings of sewing machine treadles," the next statement is significant; in this, that he particularizes and designates what he means by his inventions or "bearings," as follows:

> *"The treadle and its trunnion-bearings* are wholly independent of the cross-bar D, *except its service, as stated, to hold the brace to the legs. The bearing-holes in the brace are formed into long vertical loops to permit the entrance of the treadle."*

It will be seen so far, that the improvement in the bearings of the patentee consists of the treadle of the sewing machine cast with two trunnions particularly pointed out and designated as "B" in the specifications and drawings, which extend from the sides of the treadle, and which trunnions are sharpened to an edge or corner along their lower sides, and are placed in or dropped into "long vertical loops" in the down hanging ends of the vertical cross-brace, which are shown specifically as to location, formation, and construction, in Figure 2, which the patentee Cramer says is a "transverse vertical section through one bearing of the treadle;" or, as otherwise stated, "is a transverse vertical section of his invention."

The proportion and relation of these trunnion-bearings to the long vertical loops, and the specific object and function of the loop-holes, and of the trunnion rocking therein, is clearly shown in this Figure 2. It is seen that the patentee's treadle is permitted entrance into these long vertical loops by reason only of their peculiar loop construc-

tion. It requires neither the testimony of a mechanical expert, or even of ordinary mechanical skill, to see that when the treadle of this patent with its sharpened trunnions is dropped into these long vertical loops, that such treadle has free play in every direction, vertically and laterally, when in operation; and this fact is not only apparent from the drawing but is recognized and made certain by that part of Cramer's specification next following, and the means resorted to by Cramer to prevent free movement in every direction of this loosely deposited treadle resting upon its sharpened trunnion edges in the loop.

The broken away portion of the lower end of the cross-brace showing in detail the *invention* of the patentee; *i. e.*, his "*improvement* in *the bearings* of sewing machine treadles," is shown in the lower right hand corner of Figure 1, and is thus described particularly in his specifications:

> "Pieces of leather F, or other soft material cover the top and end of each trunnion, *to serve as cushions to keep the same close in its bearing, to prevent the noise which would result were the trunnions permitted to bounce and thump end-wise, when the treadle is in motion.* The leather F is fitted to the curve of the upper side of the trunnion, which is an arc of a cylinder whose center of oscillation is the lower edge of the trunnion. The same leather also interposes between the end of the trunnion and the adjacent iron. *f* is a block serving as a mere backer, to which the cushion F is attached. This block conforms to the back and top side of the cushion and fills the loop-hole in the brace above the trunnion. It also has tangs or projections *e*, resting in suitable recesses in the brace C, which are held between the brace and the web of the leg E, by which means the block and cushion are held in place."
>
> "*Below the bearings of the trunnions B*, I provide cups, M, attached to the ends of brace C, to catch

the oil that usually drips from *such bearings. By this construction my treadle bearings are rigidly fixed, and in no way liable to get out of line, or to require adjustment. The usual noise is prevented,* and overflowing oil is caught before it can do damage."

The patentee then states as the closing paragraph of his specification that

> "I am aware that sewing machines treadles have before been provided *with V shaped bearings,* and I do not claim the same as my invention."

This is the only disclaimer in the patent as to the several parts connected with Cramer's invention *"as to his construction and combination of parts;"* and the reason of such disclaimer will appear further along in the second clause of discussion of the construction of this patent and claim.

Cramer closes the specification of his patent by the statement

> *"What I claim and wish to secure by letters patent,* is" then follows claim 1, the foundation of this suit.
>
> "1. The vertical double brace joining the legs of the two ends of a sewing machine, *provided with holes through its lower extremities to serve as bearings, in combination with a treadle provided with trunnions fitted to oscillate in said bearings, substantially as specified."*

It would really seem that a patent so accurate and specific in its specifications, so clearly illustrated in its drawings, and so concisely and clearly stated as to identification of invention by the claim, is incapable of any misunderstanding or misconstruction as to intention and meaning of the patentee. There is nothing of ambiguity in any statement of this patent as to the invention intended.

There is nothing of obscurity in the drawings forming the pictorial illustration of the invention, and it apparently would be a matter of no difficulty to compare any mechanical construction and combination of parts representing the bearings of any sewing machine treadle with this Cramer patent and claim, and by such comparison alone determine whether or not the invention of Cramer's bearings and treadle is present in the compared device.

The question of infringement of the Cramer patent, construed on its face, by the Singer Company's machines.

This court long ago declared that a question of infringement is best determined by the court by such comparison *Seymour* v. *Osborne*, 11 Wall., 517. Or as so aptly stated in the decision of this court in *McCormick* v. *Talcott*, 20 How., 209, as follows:

> "This court has had before them a species of evidence of all others best calculated to conduct them to the truth—evidence superior to, and unaffected by the interests or prejudices of partisans, or by the opinions (the reveries, they may often be called) of a class of men styled experts; men as often skillful and effective in producing obscurity and error, as in the elucidation of truth. No witnesses can testify so clearly and so impartially as do the subjects (though mute) concerning which a controversy about identity or dissimilarity is pending."

The alleged infringing structure of the Singer Company (petitioner) relates only to a single uniform identical mechanical construction, without variation or change of any description as to any of the parts one from the other, in separate sewing machines. While the actual Singer machine itself is present here as "Plaintiff's Exhibit P,"

(Rec., p. 55), yet as a matter of fact, the Singer machine as here involved is represented, by, and made under certain letters patent granted Philip Diehl, under date of October 14, 1884, numbered 306,469, for a new and useful improvement in sewing machine stands and treadles. This Diehl patent is in evidence, printed upon record pages 85 and 86 with two sheets of drawings oppositely facing such pages. It appears by the record that this Diehl patent is identical, as to construction of the parts there shown, with Plaintiff's Exhibit P. (Rec., p. 86.) Sheet 1 of the drawings of the Diehl patent exhibits the Singer Company's exact device proceeded against as an infringement.

We herewith produce for convenient reference and comparison, upon oppositely facing pages of this brief, the single sheet of drawings of the Cramer patent with its two figures showing his invention in detail; and the drawing upon sheet 1 of the Diehl patent, showing the Singer Company Stand and Treadle; the asserted infringement of this case.

H. CRAMER.

TREADLE FOR SEWING MACHINES, &c.

No. 271,426. Patented Jan. 30, 1883

Fig 1

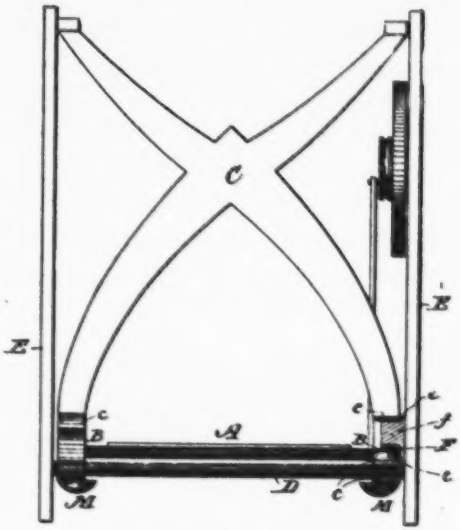
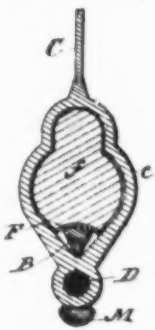


Fig 2



WITNESSES:

H. B. Brown

W. X. Stevens

INVENTOR:

H. Cramer

BY Munn & Co

ATTORNEYS.

P. DIEHL.

SEWING MACHINE STAND AND TREADLE.

No. 306,469. Patented Oct. 14, 1884.

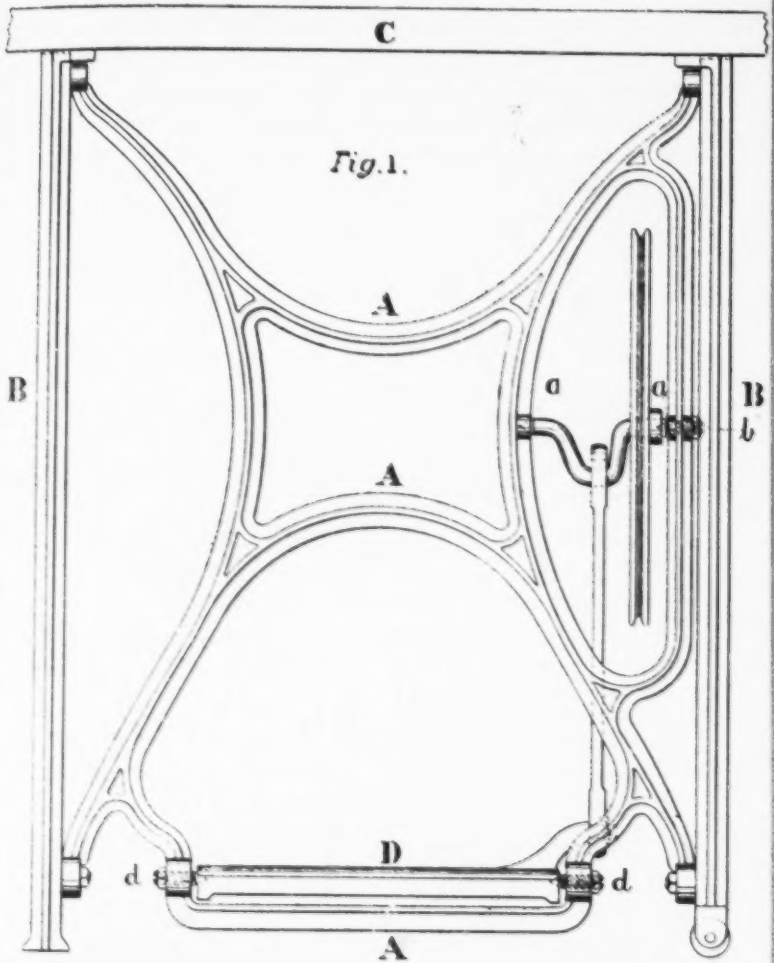


Fig. 1.

WITNESSES:

Chas. Klein

Angelo Bonaman

INVENTOR

Philip Diehl

BY Sydney A. Barnes

his ATTORNEY

It will tend, also, to clearness of understanding upon the question of infringement for the court to know accurately the intention, purpose, and result of the particular device represented upon sheet 1 of the Diehl patent.

It is without dispute that vertical double braces were old, joining the two end legs of a sewing machine, long prior to the date of the Cramer patent. This fact is recognized on the face of the Cramer patent, where, he says: "C represents the usual cast-iron double brace connecting the two end legs diagonally in a plane generally vertical." It was old and common long prior to the date of the Cramer patent in sewing machines to connect and lock fast together the lower end of such legs by a "common cross-bar." This fact is also recognized on the face of the Cramer patent, the bar is there shown, and is referred to as a "common cross-bar D."

Diehl says that his invention is a new and useful improvement in "Sewing Machine Stands and Treadles," and he thus states and particularizes his invention:

> "My invention relates to an improved construction in sewing machine stands and its object is to secure a permanent and reliable support and adjustment *for both the band-wheel and treadle* and to preserve their respective relative positions, so that they will always co-operate to produce the best results with the least danger of friction or binding."

The patentee says that Figure 1 of the drawings is a "face view of such stand within which I support both the band-wheel, crank and treadle."

The patentee Diehl then describes fully the construction of this brace, and its particular purpose, as follows:

> "This brace is formed, substantially as shown, with a loop within which the band-wheel can act, and on the sides of which are provided conical bearings

for the shaft which supports the band-wheel, and which is preferably bent so as to form a crank. To this crank is attached an ordinary pitman, which at its lower end is pivotally connected to an ordinary rocking treadle. This treadle is supported in the lower portion of said brace, which I prefer to make as shown, forming practically another loop, the lower end of which is the cross-bar on which the treadle is hung. This cross-bar may however be omitted, and the treadle hung directly on downward projections from the brace."

The patentee then states with great particularity and conciseness, the essential part and object of his invention, as follows:

"The essential part of my invention being the providing of supports for both the band-wheel and the treadle, which are integral with the brace, so that when said band-wheel, with its driving-crank and said treadle, have been hung within said brace and connected by a suitable pitman, their adjustment to and relationship with each other are practically permanently secured."

The defect and difficulty that Diehl was trying to remedy is at once apparent after reading his patent, by reference to the Cramer patent. Cramer says in his patent that he represents his treadle "A" provided with the usual pitman connections by which to run the sewing machine wheel. The pitman is there shown, as is also the sewing machine band-wheel journaled to one of the end legs of the sewing machine. This band-wheel is of course one of the most important parts of a sewing machine. It constitutes a fly-wheel, and driving mechanism to operate the entire machine. That this band-wheel should run smoothly and evenly without vibration, is essential to the success of a machine. It can be at once seen upon an examination of the Cramer drawings that in the old ma-

chine there was no fixed relation between this band or driving-wheel, and the operating treadle; the strain was entirely upon one side of the wheel, and the pitman alignment was uncertain; and the two parts (treadle and band-wheel) without capability of fixed relation to each other. The Diehl patent obviated this difficulty, and the means and structure employed for so doing is the invention in the Diehl patent.

It will be seen at once upon inspection of the drawings of Sheet 1, that what Diehl did, was to cast the old "usual cast-iron double brace," and the "old common cross-bar D" into a unitary structure; and casting therewith a supplemental loop in which to hang the driving-wheel, and its crank. This loop was so cast as to assure a permanent alignment between the crank shaft and the operating treadle, and the holding in fixed relation to each other of the band-wheel, driving crank and treadle, when in operation and when adjusted to such relationship thereby permanently secured and incapable of displacement. There was no other object in placing the treadle on the cross-bar in the Diehl patent except to produce this result; and there was no other object in placing the band or driving-wheel, and its driving crank in the loop in relation to such treadle, except to produce this result.

It will be seen at once that the device of the Diehl patent represents and stands for, and is, a concrete unit structure, that permits of the band-wheel, crank and treadle being placed in permanent position and alignment, and adjusted in relation to each other before being placed in, or allied with the stand of the machine; and this result is brought about by casting the old, common cross-brace, and the old common cross-bar together as a unitary structure, and having cast additional therewith a loop, and so

cast in its relationship to the treadle that when the treadle upon the cross-bar, and the band-wheel in the loop of the cross-brace are in position on their fixed supports, their "*relationship with each other are practically permanently secured.*" This construction has practically and commercially several advantages; in this, that it permits of this relationship being fixed before the combined cross-brace and cross-bar, with its driving-wheel, pitman, and treadle connections are sent out to the trade; and the retail dealer has only to ally this unitary structure with the stand to assure the desired results. The disadvantage of this construction is that if any part of the cast unitary structure is broken, the entire structure is destroyed. While nothing is said about it in the Diehl patent, it would seem that the casting together of the old usual cross-brace and cross-bar, with its supplemental loop, as shown in the Diehl patent, with the band-wheel is a matter of much difficulty, and really stands for the perfection of the casting art.

The nicety and accuracy of the adjustment between the driving-wheel, crank shaft, pitman, and treadle, in the Diehl patent is shown by the fact that such adjustment is so perfect that there is no means of disturbing the adjustment thereafter, except by the ordinary wear of the bearing parts, and this regulation is provided for, and the adjustment made positive by the conical bearing set screws, shown in drawings, and described in the specifications for that purpose.

No possible relationship exists between this Diehl construction and the construction and invention of the Cramer patent, either as disclosed by the specification or identified by the single relied upon claim.

There is not a line or word of description in this Cramer patent which is descriptive of or applicable to this Diehl construction, except the statement as to the usual cast-iron double brace, and the common cross-bar, admitted to be old in all sewing machine stands. Every word and line of the specifications of Cramer as to the remaining parts of his *"construction and combination of parts"* is without any semblance of parallelism, resemblance or analogy to the Diehl stand and treadle; and Cramer's first single relied upon claim has carried into it the peculiar "construction and combination of parts" described in the specifications. Here again is Cramer's first claim italicized as to every element and mechanical part identified thereby, aside from the "usual double vertical brace."

> "1. The vertical double brace joining the legs of the two ends of a sewing machine *provided with holes through its lower extremities to serve as bearings* in combination with a treadle *provided with trunnions fitted to oscillate in said bearings, substantially as specified.*"

Here we have exactly, precisely, particularly itemized, and in detail, Cramer's invention, consisting in its "construction and combination of parts," as solemnly declared in his patent.

In the Diehl device there are no holes of any kind, name, or description, through the lower extremities of the double brace *to serve as bearings*, the only holes being the old holes always present to bolt the brace to the legs

of the machine. In the Diehl device there is no double vertical cross brace *with holes through its lower extremities in combination with the treadle provided with trunnions.* In the Diehl device there is no vertical double brace *provided with holes through its lower extremities to serve as bearings in combination with a treadle, "provided with trunnions fitted to oscillate in said bearings, substantially as specified."* In the Diehl device there are simply no holes in the vertical cross-brace, or anywhere else, that serve as bearings. In the Diehl device *there is no treadle provided with trunnions of any description, much less trunnions fitted to oscillate in bearings of any description in the lower extremities of the cross-brace.* In the Diehl device, as above stated, the old, usual, vertical double cross-brace, and the old common cross-bar, are cast as a unit structure. Indeed, in the Diehl device, were it not for the band-wheel being located in the loop, you could dispense with the vertical cross-brace entirely, cut it off and take it out of the machine, and still have the old common cross-bar, and the treadle mounted upon it.

The treadle in the Diehl device has no connection whatever with the vertical double cross-brace, but is mounted in said cross-bar. This fact was so recognized by the Patent Office, and is so stated in the specifications and evidenced by Diehl's fifth claim, which is:

> "A cross-brace for sewing-machine stands, *having at its base a cross-bar, combined with a treadle mounted in said cross-bar,* substantially as set forth."

In the Diehl device his treadle is "mounted in" said cross-bar by off-sets in such bar, extending through which are conical point center screws passing into recesses in the sides of the treadle, and rocking and oscillating thereon, with its defined alignment with the band-

wheel and crank; the Diehl treadle is not only without trunnions of any description, but the presence thereon of trunnions, as provided for in the Cramer patent, would render the treadle worthless and inoperative. As a unit structure the casting of the old usual double vertical brace, and the old common cross-bar with the band-wheel carrying loop, as shown in Cramer's patent, made as to resulting structure an entirely new combined cross-bar and brace, and such new composite containing and carrying brace was an essentiality in producing an assured and permanent relation of the band-wheel and treadle with the results following therefrom, as shown in the Diehl patent. The attempt to utilize in this new brace any of the features or "construction and combination of parts" described by Cramer as his invention would manifestly have destroyed the entire utility of the structure itself. So long as the English language has in it the meaning attributed only to it as represented by the words of Cramer's patent, just so long is it certain that the structure of the Diehl patent and device is without any possible relationship or parallelism of "construction and combinationo of parts" to the Cramer patent asserted by him to be his invention. The claim of the Cramer patent provides distinctly as one of its elements of construction *that the holes through the lower extremities of the vertical double brace are to serve as bearings.* There are simply no such holes in any part of the composite brace of the Diehl structure; and this, irrespective of the fact that the holes through the lower extremities of the Cramer brace to serve as bearings, are peculiar in their character, and have a specific function attributed to them that of necessity is the essence of their construction and invention, in this, "that the bearing holes of the brace are formed into long vertical loops to permit the entrance

of the treadle." Of necessity the bearing holes in the extremities of the Cramer brace must be of such length as to loop to permit the entrance of the treadle, and this is what is meant as to the specific matter in the first claim by the words "substantially as specified."

Even the word *"through,"* as appearing in Cramer's first claim, is a word of limitation descriptive of the necessary condition and construction of the lower end of his cross-brace; for unless Cramer's loopholes extended *"through"* the lower ends of his cross-brace the backing and cushion block could not be put in place.

No holes of any kind appear in the Diehl device except such as to permit the entrance and passage of the fixed bolts.

Again, Cramer provides in his specifications that his treadle is provided with two trunnions, and that such trunnions are *"cast as a portion of the treadle;"* and that these trunnions extend *"from its sides into loop holes in the common cast iron cross-brace."* The Diehl treadle, without cavil or question, is absolutely without trunnions of any description, and is the exact antithesis of this element of construction of the claim of Cramer's patent. Two small conical recesses appear in the side of the Diehl treadle upon which the treadle rocks upon point center screws, and the only possible resemblance between the treadles is that they both rock or oscillate; and this fact is inconsequential, because they would not be treadles if they did not have this movement, and such movement was old long before Cramer's day or date. Again, the Diehl treadle is hung in the old common cross-bar, and not in or on the old vertical cross-brace, and Diehl's suggested construction of omitting the cross-bar is not presented here for consideration.

We therefore respectfully submit that upon the face of the Cramer patent itself, as it must be construed by the court, there can be found no possible identity or infringement of the controlling words of identity and limitation of the claim, and that, as stated by Cramer, his *"invention consists in a construction and combination of parts hereinafter fully described and claimed."* It is simply impossible from this Cramer patent, construed on its face, that there can be found any infringement thereof by the Diehl device, admittedly alone standing for the Singer Company's construction.

The rightful and only construction that we believe can be given to Cramer's first claim, in view of the facts disclosed and fixed by the file-wrapper and contents of his patent.

No rule of law is more firmly established by this court, as we understand it, than the rule that to determine the rightful construction of a patent, resort may be, and in certain cases must be, had to what is termed the "file-wrapper and contents" of the patent itself; or otherwise expressed, that the statements made by the patentee, or his attorney, in, or as to the original amended or substituted specifications filed in the Patent Office before the final grant of the patent—all actions of the Patent Office thereon, and the communications of the patentee personally, or by his attorney, made to the Patent Office in relation to his invention or claims—may, and at times must be, considered in determining in what the invention consists, and limiting and defining such invention as to statement and claim; and that the statements of the patentee made in the Patent Office in connection with, or as controlling statements in the grant of his patent, must be

strictly construed against him, and in favor of the public, and stand as matters of disclaimer.

This court thus states the rule in the case of *Sargent Co.* v. *Lock Co.*, 114 U. S., 86:

> "In patents for combination of mechanism, limitations and provisos, imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor, and in favor of the public, and looked upon as in the nature of disclaimers."

The rule as to statements made in the file-wrapper and contents as defining the scope and effect of a patentee's claims is thus stated by this court in the case of *Sutter* v. *Robinson*, 119 U. S., 540:

> "A comparison of the patent as granted with the application very conclusively establishes the limits with which the patentee's claims must be confined."

Upon the 25th day of May, in the year 1882, Cramer filed his application in the Patent Office for the letters patent involved in this suit. We take it that there can be no contention but that what Cramer thought he had invented, what he intended to invent, and what he actually invented, is best disclosed by his application as originally filed; and that he will not be permitted seventeen years afterward to contradict the plain terms of his application or to insist that such meaning be given to it as will sweep in and embrace a mechanical structure having none of the qualities or characteristics of any invention described in the specification, shown in the drawings, or set forth in the claims. It is evident, on examining Cramer's original application filed May 25th, 1882, that such application was in all probability written by himself personally. It is just such a specification as is

usually lodged in the Patent Office by a party supposing himself to be an inventor. Whatever may be the crudeness of this specification, it is certainly evident that Cramer then in the original application knew what he invented, and knew what he intended to claim. This original application appears in Record, pages 195-6.

This application of Cramer is so short, terse, and to the point, and so controlling as to all after changes made therein by his solicitors, that we herewith quote it in full:

> "I, Herman Cramer, of the city of Sonora, in Tuolumne county, in the State of California, have invented certain improvements in a treadle, to be used in sewing machines, or other machinery where a noiseless treadle may be required, of which the following is a specification:
>
> "My invention consists of the usual platform marked 'A' in Fig. 1 of diagram on treadle bar. The ends of said treadle bar, marked 'B' are shaped like the letter V and rest in socket in lower end of a brace 'C', the socket being ♥ shaped, the brace 'C' cast in one piece, and the treadle bar and platform on the bar is also cast in one piece.
>
> "The treadle bar rests in socket in brace 'C', which is immediately above a cross-brace usually in machines to keep them from spreading apart, the nut on end of cross-brace is marked 'D.' Letter 'M' immediately beneath cross-brace and treadle bar is an oil-receiver to retain any drippings of oil from the bearings of treadle bar.
>
> "My invention consists in having the ends of the treadle bar V-shaped to fit in hole in brace 'C', also ♥ shaped to receive the ends of the treadle bar.
>
> "This V-shaped treadle bar in brace 'C' entirely prevents noise from the treadle, is self-adjusting and does away with the necessity of cones and set-screws now in use. This I claim as my invention. Fig. 1 represents platform 'A' and treadle bar, the ends of which are V-shaped and marked 'B.'
>
> "Fig. 2 represents the lower end of brace 'C' with

hole ♥ shaped to receive the ends of treadle bar 'B.' 'D' represents nut on end of cross-brace immediately below treadle bar.

" Witnesses: HERMAN CRAMER.
" FRANK W. STREET.
" CHARLES L. STREET."

In his oath made following this specification (Rec., p. 196), and so that there can be no mistake as to what the patentee actually had invented as stated in his specification, he says in such oath that he verily believes himself to be the "original and first inventor of *the improvement in noiseless self-adjusting treadle described in the foregoing specification.*" This is the only invention in the oath that he says he made, or is disclosed by the specification.

It is perfectly evident from this specification, aside from the oath that what Cramer thought he had invented and produced by his peculiar and particular combination was a noiseless treadle," and as stated in his application "to be used in sewing machines, *or other machinery where a noiseless treadle may be required;*" and his invention was to bring about this result by the particular and peculiar construction of mechanism described in his specification and shown in his drawings. It is entirely evident, also, that this "noiseless treadle" was produced by reason of the V-shaped treadle-bar resting and rocking in the peculiar heart-shaped openings or sockets in the lower end of the brace, with the muffler alliance mentioned in the specification, and shown in the drawings. The treadle-bar was self-adjusting by reason of its V shape and the peculiar trough in which it rested and rocked, because, as either the V-shaped bar or the trough wore away by use, such wearing permitted the treadle-bar to adjust itself to the trough under all conditions,

and with the muffler attachment shown, "entirely prevents noise from the treadle;" and so that there can be no mistake as to his invention in his first application, irrespective of his oath, after describing the above particular and peculiar shaped construction and combination, he says, *"This I claim as my invention."*

Cramer's first specification contained no formulated claim of his invention, and under the rules of the Patent Office was therefore an incomplete specification. Four days later, or upon the 29th day of May, 1882, the Patent Office wrote Cramer that his specification was not prepared in conformity with the rules of the Office; was written upon both sides of the paper, and was without appended claim; that the oath was defective; and also stated to Cramer that the Gregory patent No. 256,563, of April 18th, 1882, "exhibits the alleged invention." (Rec., p. 197.)

Upon August 3rd, 1882, Cramer sent to the Patent Office another specification in place of the "informal specification" rejected by the Patent Office. (Rec., p. 199.) Such specification appears upon Record pages 197-8. This specification is without substantial difference from the one originally filed, but restates his invention slightly in detail, with what he evidently intended to be an appended claim required by the letter of the examiner. This specification is short, and we herewith quote it in full:

> "Specification forming part of application filed May 25th, 1882, by Herman Cramer for sewing machine, etc.
>
> "I, Herman Cramer, of the city of Sonora, in Tuolumne County, in the State of California, have invented certain improvements in a treadle and brace to be used in sewing machines or other machinery

where a noiseless treadle may be required of which the following is a specification.

" My invention consists in a combination of the usual platform marked 'A', in Fig. 1 of diagram on treadle bar. The ends of said treadle bar marked 'B' are to bear against mufflers.

" The treadle-bar bearings are in and on brace 'C.' The treadle bar rests in socket in brace 'C' which is immediately above a cross-bar usually in machines to keep them from spreading apart. The nut on end of cross-bar is marked 'D.' Letter 'M' immediately beneath cross-bar and treadle bar is an oil-receiver to retain any drippings of oil from the bearings of treadle bar.

" The treadle bar, mufflers and brace 'C' are held between the right and left legs of the machine by means of a brace bar underneath the treadle bar.

" This brace and socket or bearing in or on brace is in one piece.

"The treadle bar with mufflers on the ends working or bearing in or on brace entirely prevents noise from the treadle is self-adjusting and does away with the necessity for cones and set-screws now in use.

"Fig. 1 represents platform 'A' and treadle bar the ends of which may be V-shaped or any shape to suit marked 'B'.

"Fig. 2 represents the lower end of brace 'C'.

'D' represents nut on end of cross-bar immediately below the treadle bar.

"What I claim is a combination of brace 'C' with socket or bearing in it or on it, to receive the treadle bar with the mufflers at the ends of treadle bar or in or on brace 'C' in connection with said brace 'C' and the treadle bar in connection with brace 'C' and mufflers to work in or on brace 'C' substantially as set forth.

"Witnesses: "HERMAN CRAMER.

CHARLES L. STREET.

FRANK W. STREET."

In this specification Cramer mentions specifically, and brings into prominence the mufflers of his patent, and

the part they play in the production and assurance of his "noiseless treadle." He says: "The ends of said treadle bar marked B are to bear against mufflers." . . . . "The treadle-bar, mufflers and brace 'C' are held between the right and left legs of the machine by "means of a brace bar underneath the treadle bar. . . . The treadle bar with mufflers on the ends working or bearing in or on brace entirely prevents noise from the treadle, is self-adjusting, and does away with the necessity for cones and set-screws not in use:" and the mufflers of his patent are made one of the particular elements of his claim.

We have then here not only the statement of Cramer as to his invention and in what it consists, but also his statement in claim form as to what is his invention, as required by the Patent Office; and it is entirely evident that this whole second specification, as did the first, relates to a "noiseless treadle" that was to be self-adjusting by use and wear, and it was to be made noiseless and adjustable by the peculiar character of its construction, and by the muffler devices illustrated in the drawings, and associated and allied therewith.

Cramer's second amended application and claim was rejected by the Patent Office upon the patent of Donovan, of June 28, 1881, No. 243,529 *"in view of which a patent is again refused."* (Rec., p. 198.)

The case then went into the hands of Munn & Company of New York and Washington, who, upon October 17, 1882, cancelled all the specifications above referred to of Cramer, *"except the signature"* and substituted therefor the specification represented by letters patent in suit. (Rec., pp. 199-200.) Accompanying this specification of Munn & Company was a letter from them, at-

tempting to meet the references to Gregory and Donovan, upon which the application had been rejected, by the following communication: (Rec., p. 201.)

> "Gregory, referred to, pivots the grooved trunnions of his treadle upon knife-edges secured within the upper loops of two collars, which are secured to the cross-bar by means of set-screws to keep them from turning. Donovan pivots his treadle upon its trunnions having sharpened edges, in grooves in the cross-bar, where it is held by collars provided with flanges projecting over the trunnions. *Applicant pivots his treadle upon the sharpened edges of its trunnions in loop-holes in the two ends of the brace* which is bolted to the legs of the machine by the two ends of the cross-bar. This service of the cross-bar might be as well performed by two short bolts; but the bar being a usual cross-tie to stiffen the legs, applicant uses its ends as bolts to hold his brace ends to the legs. *We have rewritten the specification to elucidate the inventor's claim.* Should the case meet with favorable consideration a new drawing will be furnished. For the purpose of examination see pencil sketch on sheet of drawing filed.
>
> "Your ob't servants,
> MUNN & Co."

This application of Munn & Company was again rejected by the Patent Office upon the references previously cited—"that of Gregory in particular meets the alleged invention." (Rec., p. 201.) Munn & Company replied to this objection as follows: (Rec., p. 201.)

> "The examiner will please notice that the applicant's invention places both bearings of the treadle in the cross-brace.
>
> "By this means they may be made perfectly true in line either by casting or drilling and they cannot be thrown out of line either by use or by the most awkward setting up.
>
> "Therefore, one source of friction is avoided. All the references have shown bearings made of two

separate pieces which could readily be set up out of line or even be worked loose. The advantage is obvious.

"A reconsideration is respectfully asked.

"Your obedient servants,

MUNN & Co."

It is entirely evident that the proposed conditions stated by Munn & Company in this communication, are wholely original with them; and nothing in Cramer's applications filed by himself in the first instance, and second by his first solicitors, contained or hinted at any such purpose or office of his special construction. Such communication is simply the legerdemain language of an expert patent solicitor hunting for differences of construction upon which to base a further request for the grant of a twice rejected application. And moreover, these supposed conditions referred to by Munn & Company in this last communication, can only be approximately secured as to any desired result, in the Cramer device, by using all of the particular elements described in Munn & Company's specifications for this especial purpose; namely, as to the trunnions *"to keep the same close in its bearing, to prevent the noise which would result were the trunnions permitted to bounce and thump end-wise when the treadle is in motion."*

It seems quite clear from these Patent Office record facts, that this patent is a sample of Munn & Company's patents where the true and right statements of the invention of Cramer has been simply so changed and limited as to form of expression that the Patent Office was induced to grant the patent by reason of the limitations imposed in such statements.

Munn & Company, at the date of the Cramer application, were doing a wholesale patent soliciting business,

and their rule of procedure seemed to be the obtainment of patents by reason of differences in eye appearance between mechanisms and peculiarity of construction. The fact that Munn & Company at once struck out all of Cramer's pending specifications *except signature,* and substituted therefor, a specification drawn by themselves, is ample evidence of this fact. Munn & Company's entire specification is built around the usual scheme of these solicitors to obtain a patent for a particular construction having some mechanical peculiarity, and evidently was intended to be so drawn as to escape the terms of the references cited, and to procure the patent by reason of such peculiarities of construction, or as stated by Munn & Company in their specifications in defining Cramer's invention "my invention consists in the construction and combination of parts hereafter fully described and claimed."

Cramer, without doubt, as shown by his first application, supposed he was the inventor of the V-shaped treadle bar *per se.* The references to the patents of Gregory and Donovan dispelled this illusion, and it had to be abandoned; but Munn & Company saw that V-shaped bearings, while not new *per se* with Cramer, were new in the particular manner of construction and alliance with the treadle, as shown by him, and were new in their application and association with the long vertical loops disclosed in the Cramer patent. Munn & Company saw that the V-shaped bearings used upon trunnions cast integral with the treadles, and extending from the sides of the treadle into the loop holes, was new with Cramer, and was not met by reference to either Gregory or Donovan. In the Donovan patent there is a treadle bar on, or with which the treadle is cast; but there must be an entire and distinct

treadle, and an entire and distinct bar; but in the Cramer patent there are simply two trunnions cast as a portion of the treadle, extending from its sides and sharpened to an edge or corner, along their lower sides.

None of the patents cited, or present, show this particular construction even, of the two trunnions cast as a portion of the treadle sharpened to an edge along their lower sides. None of the patents cited or shown in this record show the long loop-holes exhibited in the Cramer patent "hollowed to an angle more obtuse than the edge of the trunnion, to serve as a bearing for the same and permit the rocking motion common to treadles."

None of the patents cited or present exhibit any of the muffler devices particularly described in the Munn specifications, but not so called, and which Munn & Company say in their specification that "by this construction my treadle bearings are rigidly fixed and in no way liable to get out of line, or to require adjustment. The usual noise is prevented, etc."

Whatever reason there might have been that induced the examiner to change his mind and withdraw the record objection to this patent as shown, we do not know; but certain it must be that the examiner in granting this Cramer patent simply gave, and intended to give, Cramer the benefit of the doubt only, as to whether he was entitled to a patent, and to grant said patent to him only for a particular "construction and combination of parts, fully described and claimed," which he says was his invention. It will be noticed in this connection also, that in the specification as drawn by Munn & Company, and as here present, that the provision in the first specification, that the bearings might be *on the brace*, in distinction from in the brace, was eliminated; and that it is

provided in the specifications of Munn & Company not only that the long loop-holes should be *in* the brace, but that these "holes should extend *through* its lower extremeties" and this also is the first claim.

Again, while in the Cramer specification as filed, his invention of a "noiseless treadle" applied to all kinds of machinery; yet Munn & Company narrowed his specification so that his invention was to apply only to a "sewing machine," practically admitting thereby that there could be no claim for any such construction or combination "in other machinery where a noiseless treadle may be required."

There would seem to be no reasonable doubt at all that the Patent Office granted this twice rejected Cramer patent over the references cited by reason of the particularized and peculiar construction and combination of the parts exhibited; and by reason of the fact that Cramer in his patent so distinctly states as his invention, that without such particular and peculiar restrictions, as appear in the statement of invention, and as appear in the claim, this twice rejected patent would never have been allowed.

A most fair and liberal view to Cramer as to the effect of his statements in the Patent Office, and in his applications antecedent to the grant under the Munn & Company specification and their effect upon the right construction of the patent, is certainly found in the opinion of his Honor Judge McKenna, in the case of *Cramer* v. *Fry*, 68 Fed. Rep., 209, where the learned Judge says:

> "It will be observed that these proceedings all tend to making special the devices, and fixing their relations. It must be assumed, of course, that the technical language of the claim of the patentee was used technically. The double brace is provided with

holes to serve as bearings, and the treadle provided with trunnions having knife edges to oscillate in said bearings. What, then, is a bearing? It is defined by Webster to be in mechanics: (a) The part in contact with which a journal moves, as the journal boxes, trusses, etc.; (b) That part of the shaft or axle which is in contact with supports. To the same effect is Knight's American Mechanical Dictionary, only reversing the order: (a) The portion of an axle or shaft in contact with its collar or boxing; (b) the portion of the support on which the gudgeon rests and rotates. The definition of the witnesses makes the bearing consist of two parts, one movable and one immovable; the definition of the books makes it consist of either part—either the movable or immovable part; the patentee uses it for the immovable part. The holes in the cross-brace are to be the bearings for the trunnions of the treadle. The corresponding bearing in the defendant's machine is not in the treadle. In this particular the devices are different—the bearings are not in the same place. In plaintiff's device it happens that both bearings are in the cross-brace. In defendant's device, however, even if we consider the support as part of the bearings, as contended for by plaintiff, only one bearing is in the cross-brace. But in the definition of a bearing we observe that the support is not a part of it; a bearing being 'the portion of the support on which the gudgeon rests and rotates.' Again, the treadle of the patentee is provided with trunnions with knife edges; the treadle of the defendant is without trunnions and without knife edges. This makes another difference. It is familiar law that all the elements of a combination must be used to make infringement, no matter how immaterial any one may be. Is a treadle with a trunnion the same thing as a treadle without a trunnion? If not, the omission of the trunnion is the omission of the element. But, passing this, is a treadle with a trunnion with knife edges having bearings in holes in the cross-brace substantial to the plaintiff's purpose? It seems to me to be. It was urged as the value of the plaintiff's device by

> Mr. Munn in his letter of October 25th, *supra*, and the language of the claim cannot be escaped."

We say that this statement is most fair and conservative to Cramer because his Honor does not indeed take into account, as we have done here, those several minor statements and conditions which we have discussed and pointed out, which all point to the absolute rightfulness and accuracy of the conclusions and findings expressed in the above quotation.

We, therefore, respectfully and confidently contend that no construction can, or should be given by any court to this Cramer patent, other than as dictated by the proceedings in the Patent Office, and as asserted by Cramer himself as a condition precedent to the granting of the patent. Of course the patent so construed in the light of the file-wrapper and contents there can be no possible contention of infringement by the Singer Company, and the requested instructions to the jury to return a verdict for the defendant, should have been granted by reason of these facts and conditions alone.

Some authorities of this court upon the above conditions and propositions, and their particular application to the contentions at bar.

The two propositions so far discussed are:

1. That the Cramer patent rightly read and construed upon its face—the Singer Stand and Treadle does not infringe the first claim.

2. The Cramer patent rightly construed in the light of the file-wrapper and contents, the Singer Treadle and Stand does not infringe the first claim.

As we understand and read the decisions of this court,

it is now settled law that where a patent consists of and represents simply as to invention, an improvement, or patentable combination, the patentee is so required and expected to set forth in what such improvement and patentable combination consists, and to so distinguish it from the old art, that the improvement as an invention can be at once understood; and in what it consists in distinguishment from the old art; and this for the further good reason, (as to which decisions of this court have not been heretofore cited) so as to make it unnecessary for this, or any court, or the public to examine the old art and find out in what the improvement or patentable invention or combination consists—and that the patentee, as to an improvement or patentable combination, before he can expect to extend his patent or claim beyond substantially the form and statement of construction shown and described in his patent for such improvement, or combination—he must so indicate and express in his patent.

In the case of *James* v. *Cambell,* 104 U. S., 356, this court held in substance that where the claim of a patent was clear and explicit, as well as the specifications, the court would not go into the history of the art, and would abide by the claim.

In the case of *Mahn* v. *Harwood,* 112 U, S.. 360, this court said:

> "The taking out of a patent which has (as the law requires it to have) a specific claim, is notice to all the world, of the most public and solemn kind, that all those parts of the art, machine or manufacture set out and described in the specification, and not embraced in such specific claim, are not claimed by the patentee. . . .
>
> "Then, what is the situation? The public is notified and informed by the most solemn act on the part of the patentee, that his claim to invention is

for such and such an element or combination, and for nothing more."

In the case of *Fay* v. *Cordesman,* 109 U. S., 421, this court says, in speaking of the patentee as to his claim:

> "It is his province to make his own claim and his privilege to restrict it."

The case of *Keystone Bridge Co.* v. *Phoenix Iron Co.,* 95 U. S., 274, where the opinion of the court was given by the late Justice Bradley as to the province and scope of a claim, its metes, and bounds, is so apt an application to every feature of this case that we here quote therefrom in full.

> "When a claim is so explicit, the courts cannot alter or enlarge it. If the patentees have not claimed the whole of their invention, and the omission has been the result of inadvertence, they should have sought to correct the error by a surrender of their patent and an application for reissue. They cannot expect the courts to wade through the history of the art, and spell out what they might have claimed, but have not claimed. Since the Act of 1836, the Patent Laws require that an applicant for a patent shall not only, by a specification in writing, fully explain his invention, but that he 'shall particularly specify and point out the part, improvement, or combination, which he claims as his own invention or discovery.' This provision was inserted in the law for the purpose of relieving the courts from the duty of ascertaining the exact invention of the patentee by inference and conjecture, derived from a laborious examination of previous inventions, and a comparison thereof with that claimed by him. This duty is not cast upon the Patent Office. There his claim is, or is supposed to be, examined, scrutinized, limited, and made to conform with what he is entitled to. If the Office refuses to allow him all that he asks, he has an appeal. But the courts have no right to enlarge a patent beyond the scope of its claim as al-

lowed by the Patent Office, or the appellate tribunal, to which contested applications are referred. When the terms of a claim in a patent are clear and distinct (as they always should be), the patentee, in a suit brought upon the patent, is bound by it. *Merrill* v. *Yeomans*, 94 U. S., 568. He can claim nothing beyond it. . . . (279.) As patents are procured ex parte, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim; or, if broader, they must be held to have surrendered the surplus to the public."

In the case of *White* v. *Dunbar*, 119 U. S., 51, this court says:

"Some persons seem to suppose that a claim in a patent is like a nose of wax which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from, what its words express. The context may, undoubtedly, be resorted to, and often is resorted to, for the purpose of better understanding the meaning of the claim; but not for the purpose of changing it, and making it different from what it is. The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public as well as an evasion of the law, to construe it in a manner different from the plain import of its terms. This has been so often expressed in the opinions of this court that it is unnecessary to pursue the subject matter further. See *Keystone Bridge Co.* v. *Phoenix Iron Co.*, 95 U. S., 274, 278; *James* v. *Campbell*, 104 U. S., 356, 370."

In the case of *Burns* v. *Meyer*, 100 U. S., 671, the late Mr. Justice Bradley, speaking as to the determination of the invention by the claim, as shown by its terms, says:

"It is well-known that the terms of the claim in letters patent are carefully scrutinized in the Patent Office. Over this part of the specification, the chief

> contest generally arises. It defines what the office, after full examination of previous inventions, and the state of the art, determines the applicant is entitled to."

In the case of *McClain* v. *Ortmayer,* 141 U. S., 424, this court, speaking through Mr. Justice Brown, says:

> "The object of the patent law in requiring the patentee to particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery,' is not only to secure to him all to which he is entitled, but to apprise the public of what is still open to them. The claim is the measure of his right to relief, and while the specification may be referred to to limit the claim, it can never be made available to expand it."

We respectfully suggest that this last remark applies with equal reason and accuracy to the statements appearing in the File-wrapper and Contents of a patent, namely: That while the File-wrapper and Contents may be referred to to limit the claim, they can never be made available to expand it.

In the case of *Railroad Company* v. *Mellon,* 104, U. S., 112, this court, speaking through the late Mr. Justice Blatchford, says:

> "The right of the plaintiff depends upon the claim of the patent according to its proper construction, and not upon what he may erroneously suppose it covers."

A decision of this court as to identity of principles and conditions involved, believed to be peculiarly applicable to this case.

It is at times of value and assistance to the courts at the circuit in arriving at right conclusions, to run a parallelism between a leading case in this court and the case un-

der discussion, where there is sufficient identity between the facts to justify such reference.

The case of *Snow* v. *Railway Co.*, 121 U. S., 629, appears to us to be peculiarly applicable and controlling to the facts and questions present now under discussion, and the construction given by this court in that case to a combination claim, in view of the statements in the specifications, is controlling in this case. Even admitting that there can be found or read into the Cramer patent some suggestion that the real invention does not reside, as Cramer says, "in the construction and combination of parts described and claimed;" but consists in the alliance of the treadle with the cross-brace, no matter in what manner the parts are constructed or combined, a quotation from the opinion of this court shows the fallacy of any such contemplated construction of the Cramer patent. The court below held that in construing the patent in the light of the specifications there could be no possible infringement, as follows:

> "Although the complainant's patent of June 11, 1872, suggests the principal and the most valuable parts of the combination found in the defendant's steam bell ringer, the plain and explicit language of the specification requires a construction of the first claim which will enable the defendant to escape liability as an infringer. The first claim must be limited to a combination in which the piston and piston-rod are detached from each other."

This court endorsed and adopted this language of the circuit Judge, and the reasons therefor, as follows:

> "On this appeal it is urged on behalf of the appellants, that this construction of their patent is too narrow; and it is now contended that the detachment of the piston and piston-rod is not an essential part of the description and claim of the invention pat-

ented. We cannot, however, but agree with the circuit Judge, that the language of the specification limits the first claim to a combination in which the piston and piston-rod are detached from each other. In describing his invention in the introductory part of the specification, the patentee manifestly divides it into two parts; the first relates 'to the construction of a steam bell-ringer in such a manner as to prevent any apparent leakage, either of water or steam, without resorting to the use of stuffing boxes;' the second, to cause the admission and release of the steam directly by the motion of the piston, and without the use of any intermediate parts between the piston and valves. . . .

"In the description of the device, with reference to the drawings, the specification says: 'The piston G is disconnected from its rod D, to prevent any lateral strain being communicated to it, thereby decreasing to some extent the wear of the piston in the cylinder.'

"*It is not admissible to adopt the argument made on behalf of the appellants, that this language is to be taken as a mere recommendation by the patentee of the manner in which he prefers to arrange these parts of his machine. There is nothing in the context to indicate that the patentee contemplated any alternative for the arrangement of the piston and piston-rod.*"

Applying the logic and finding of this decision to the construction contended for by Cramer as to the first claim, we find that the specification provides distinctly and unequivocally for certain constructions of the mechanism afterwards referred to in the claims, and having the following peculiarities and characteristics of construction:

1. The treadle is cast integral with two trunnions, one upon each side.

2. Said trunnions extend from the side of the treadle into loop-holes in the common cast-iron cross-brace.

3. Said trunnions are sharpened to an edge or corner

along their lower sides, and the lower end of the loop-hole is hollowed to an angle more obtuse than the edge of the trunnions, to serve as a bearing for the same and permit the rocking motion common to treadles.

4. The treadle and its trunnion bearings are wholly independent of the cross-bar, except its service of holding the brace to the legs.

5. The bearing holes in the brace are formed into long vertical loops to permit the entrance of the treadle.

6. The holes must be *through* the lower extremities of the vertical double cross-brace.

The patentee having previously stated that his "invention relates to improvements in the bearings of sewing machine treadles," etc., "and to this end my invention consists in the construction and combination of parts hereinafter fully described and claimed, reference being had to the accompanying drawings;" the patentee further saying: "By this construction my treadle bearings are rigidly fixed," etc.; the claim of the patent then being as follows: "The vertical double-brace joining the legs of the two ends of a sewing machine, provided with holes through its lower extremeties to serve as bearings in combination with a treadle provided with trunnions fitted to oscillate in such bearings. substantially as specified."

To paraphrase the language of this court in this last case and here apply it for example "there is nothing in the context to indicate that the patentee contemplated any alternative" for this arangement, and it would seem to be certain that a treadle *without trunnions* is not a treadle with *trunnions cast thereon as distinctly* provided for in the Cramer patent. It would seem to be certain that a vertical, double brace or any other kind of a brace joining

the two ends of a sewing machine having no holes whatever, of any description, to serve as bearings, is not the alternative, under these specifications, of a vertical double brace having holes through their lower ends to serve as bearings. It would seem to be certain, also, that a vertical double brace with no vertical loops in its lower end to permit the entrance and exit of the treadle, in combination with a treadle provided with trunnions fitted to oscillate in such loop, or bearings, is not an alternative for a vertical brace that has neither holes nor loops of any description in its lower extremeties to serve as bearings, and has no capacity for oscillation of any description in such bearings.

It would seem to be certain that a treadle hung in the old cross-bar of a sewing machine is not the alternative of a treadle hung in the old cross-brace.

It is true that there can be found in the specification the statement of the patentee that he is "aware that sewing machine treadles have before been provided with V-shaped bearings, and I do not claim the same as my invention." The presence of this disclaimer is accounted for by the action of the Patent Office, and the disclaimer is no broader than the precise language used; and it means nothing more nor less than that Cramer was not the inventor of V-shaped bearings *per se*, but, as shown by this specification and the file-wrapper and contents, this statement means nothing else except that although Cramer finally disclaimed that he was the inventor, *per se*, of V-shaped bearings, he still contended he had made an invention by organizing the structure shown in his patent, and that he was the first to use V-shaped bearings on trunnions cast integral with a treadle; that he was the first to extend said trunnions into peculiar loop-holes having

the peculiar characteristic and quality of being hollowed to an angle more obtuse than the edge of the trunnion, and to serve as a bearing for such V-shaped trunnion, and permit the rocking motion of the treadle and to permit the treadle to be put in and taken out at will; and that he was the first to so surround and cushion said trunnion bearings in their loop-hole action as to prevent said trunnions from bouncing and thumping endwise when the trunnions were in motion.

The single fact that Cramer disclaimed in his patent "sewing machine treadles provided with V-shaped bearings" and did not disclaim as to any other part of his described mechanism, proves conclusively that his asserted invention consisted, as he says in his patent, in the "construction and combination of parts described and claimed."

Again, although the hanging of the treadle in the lower depending ends of a cross-brace would be of equal value and efficiency if applied to all other kinds of machinery driven by a treadle, as so stated in Cramer's first rejected application, there is not a line of testimony in this case that shows that such hanging was of any utility by reason of the fact that such hanging had been adopted and used in any other style or class of machinery besides a sewing machine, it always being open to every industry, so far as the Cramer patent is concerned, to so hang their treadle; as the Cramer patent, as to specification and claim, is confined solely to a sewing machine, and disclaimed by the file-wrapper and contents as to all other kinds of machinery.

We respectfully submit that the rule of law and construction as laid down in this last case, *supra*, should govern the construction of the Cramer patent and claim

in this case; and so governing, the Singer Company's Brace and Stand does not, and cannot, infringe Cramer's first claim.

The antecedent art bars any amplified construction being given to Cramer's patent, even if his specification and claim so permitted. The old art as to sewing machine stands and treadle bearings, both as disclosed by the records of the Patent Office, and as proven to exist in and among the leading sewing machine manufacturers of the United States, proves unquestionably and conclusively two conditions: (1) That the Cramer "invention consisting in the construction and combination of parts fully described and claimed," is of doubtful capability of employment commercially. (2) That simply the hanging of a sewing machine treadle in the lower depending ends of a vertical cross-brace of a sewing machine, per se, is without added value or utility, in that industry.

We are of course aware that in the case of a valuable and basic invention, that has worked a revolution in the industry to which it relates, and is manifestly of great value and utility in such cases where there is nothing of limitation on the face of the patent, nor in the file-wrapper and contents, nor in the old art, and nothing of negation as to the value and standing of such invention—that the court will give a far more wide and liberal construction to the patent than if such conditions did not exist. For this reason, irrespective of the constricted terms of the patent, and the claims, and the proceedings in the Patent Office, we desire that this court shall know that there is nothing in even any idealization of this Cramer pat-

ent, as insisted upon by his counsel, that shall justify any other construction of the patent than plainly necessitated by the terms of the patent itself.

As to the first position, above asserted, the reason of the doubtful capability of employment commercially in the sewing machine industry of the Cramer devices, such fact is plainly apparent simply from an inspection and study of the patent. It is perfectly evident that the sharpened edges of the trunnions riding in the loop, as shown in Figure 2, when the treadle is dropped into position in the long vertical loops, would simply, in action, play backwards and forwards like the shuttle of a weaver's loom "and bound and thump endwise when the treadle is in motion," as expressed in Cramer's patent. The outer ends of the sharpened trunnions would strike against the iron of the legs of the machine, and such a construction would, clearly as a commercial proposition, ruin the sale of the machine.

Again, it is entirely apparent both from an inspection of the mechanism of the Cramer patent, and from the specifications thereof, that to make a machine practicable, the treadle bearings must be secured and controlled after being dropped into the long vertical loop, by the accompanying devices therein described; namely, the block serving as a backer upon which the cushion is fastened and fitted into the loop-holes, for confining and regulating the movements of the treadle. The specification provides that this block has projections or tangs fitted into the recesses of the brace, and held in place between the brace and the leg of the sewing machine stand. It is perfectly apparent from this construction that the blocks, cushion, and confining devices for Cramer's treadle must be placed in position before the brace is allied with the stand, for

manifestly it is impossible to place the block and cushion in position after the brace has been so allied.

It follows from this fact also, that after the block and cushion have been put in position for confining the treadle in Cramer's construction, that the treadle cannot be removed from the frame of the sewing machine without taking the frame apart, and it needs no testimony to establish the fact that the alliance of any kind of a treadle with a sewing machine in such manner that the machine would have to be dismantled, and the frame taken apart before it could be removed, would be commercially without capability of employment by any sewing machine manufacturer, and would mean simply the extinguishment of the value of the machine as a standard machine, if placed therein.

There is no testimony in this case from any user of the device of the Cramer patent, purchasing the same of Cramer, that it has any value. There is no testimony in this case to any value of this Cramer device by any party who ever manufactured it. The only testimony in this record as to the making at any time of any device under this Cramer patent, is by Cramer himself, his son, and daughter, young children at that time. Cramer himself testified: That the devices of his patent can be put into any sewing machine, and is an attachment to a sewing machine.

There never has been a sewing machine made in this country from the beginning, which had a vertical cross-brace and treadle, which cross-brace could not have been taken out and the cross-brace and treadle of Cramer substituted therefor. There never has been a sewing machine manufactured in this country from the beginning, without a cross-brace in which the cross-brace and treadle

could not have been inserted and used. Cramer so testifies.

Cramer also testifies that he made his first brace and treadle like his patent, and put in the first cross-brace and treadle of his patent in the year 1881; that he was a dealer in new and secondhand sewing machines, and put his patented cross-brace and treadle in machines which he bought and sold; that he never had but two sets of castings made of his patented brace and treadle to be put by him into sewing machines, and these did not exceed 25 to 40 in number; that these castings were made the first lot five or six in number, at Sonora, California in the year 1881 (Rec., p. 41); the second set of castings were made at San Francisco in the year 1883 (Rec., p. 42); that he put the last of these thirty-five or forty castings of his patented brace and treadle into sewing machines in the year 1885 (Rec., p. 44); that he had ample means and capital and backing to make these devices during that time. (Rec., p. 58.)

Cramer himself testified that after the grant of his patent, he wrote to, and attempted to induce, every one of the principal sewing machine manufacturers in the United States to adopt and use the invention of his patent sending them an identification and a copy of his patent (Rec., p. 87), and that no manufacturer so written adopted it. The testimony shows that none of the leading sewing machine manufacturers in the United States adopted the devices of this Cramer patent during its lifetime. Cramer so testified. And the petition for certiorari shows that no sewing machine manufactuer of the United States has adopted or followed the devices of the Cramer patent, or even hung their sewing machine treadles in a cross-brace in any way or manner in a sewing machine since the expiration of the Cramer patent. (Petition for Certiorari Writ, p. 18.)

We respectfully submit that there can be no more persuasive or convincing testimony as to the total commercial worthlessness of the devices of the Cramer patent consisting in "the construction and combination of parts fully described and claimed" by him, than the facts which appear from Cramer's own testimony. Everything outside of these statements of facts appearing in the Cramer deposition is clearly conclusions and unwarranted statements upon his part, and contradicted by all the facts themselves.

The testimony and the old art show that Cramer was the first and last inventor or manufacturer of the peculiar mechanical abnormal structure shown in his patent. The testimony and the old art show, however, that every advantage claimed for the idealized construction of the Cramer patent by his counsel is present time and again in the old art, and in sewing machines, and for thirty years has been there present and not departed from.

Engish patent to Bourdin, dated June 27, 1874, No. 2,232, for an improvement in sewing machines (Rec., p. 202-3-4-5) plainly exhibits in the drawings and in the specifications a treadle hung on a cross-bar, mounted in the lower depending ends of a cross-brace of a sewing machine; the drawing clearly illustrating this fact appears opposite Record, page 205. The inventor in that case does not seem to think that such mounting and construction is anything unusual; or any particular description thereof necessary other than represented by the drawings. In this Bourdin patent the treadles are spaced and held apart by collars on the cross-bar or tie-rod; but they represent not so wide a departure from the Cramer patent as the Diehl structure, or Singer device.

The remainder of the patents present as exhibits in

this record represent substantially well-known methods and means of mounting the treadle upon a cross-bar, or tie, used by the principal sewing machine manufacturers of the United States for thirty years past, and more particularly referred to and described hereafter, and not, therefore, at this time enlarged upon, for the reason that the practical testimony of the existence and use of the device standing for the old art, is of more weight than the patents describing the same.

We will now turn to the other clause of discussion under the last heading as bearing upon any possible construction that can be given to the Cramer patent, namely, (2) *that simply the hanging of a sewing machine treadle in the lower depended ends of a vertical cross-brace of a sewing machine, per se, is without added value or utility in that industry.*

We have in the preceding part of this brief attempted to show your Honor that in the device of the Diehl patent, used by the Singer Company, and constituting the asserted infringement in this case—that in that device the hanging of the treadle in the cross-bar, as is provided for in the Diehl patent is a mere accident or incident of construction so far as such hanging is concerned; and that the treadle is only there so hung as to procure a desired and necessary relation between the band-wheel and the treadle for the purposes described in the Diehl patent. The Diehl patent states the invention of this construction as follows:

> "The essential part of my invention being the providing of supports for both the band wheel and the treadle, which are integral with the brace, so that when said band wheel with its driving crank and said treadle, have been hung within said brace and connected by a suitable pitman, *their adjustment*

to and relationship with each other are practically permanently secured."

What earthly relationship does this invention and construction bear to the Cramer devices described and claimed?

On the trial of this case the inventor Cramer himself, and his counsel, simply cut loose from the patent and first claim, as to all qualifications and restrictions, and tried the case before the jury, and was permitted to so try the case by the court, upon the theory that Cramer's invention was, as a matter of fact, the hanging of the treadle in any way, in or upon or in connection with a vertical double brace, by any means. This position is represented by the multitudinous statements of Cramer and his counsel by such expressions as: "That is my invention—hanging the treadle in a vertical double brace" (Rec., p. 69); and "I sue them for hanging the treadle in a vertical brace" (Rec., p. 103); and *"My patent is simply for the method of hanging the treadle in the lower end of a vertical double brace"* (Rec., p. 74), Cramer continually asserting that the great advantage of this construction was keeping both bearings of the treadle in alignment. (Rec., p. 40.)

The testimony in this case shows that all of the principal sewing machines of the leading manufacturers in the United States have been handled and sold by large agencies on the Coast, principally at San Francisco, for the last thirty years. Cramer himself, as a second-hand dealer, says he "sold most every kind of machine in the market" (Rec., p. 84), and mentioned by name the leading sewing machines upon the market at that time, such as the Domestic, Wheeler & Wilson, Howe, Davis, White, Wilcox & Gibbs, etc. (Rec., p. 84.)

It is scarcely open to dispute that the manufacturers

of these sewing machines, and their managers and agents, knew perfectly well, as a question of fact, whether there was any advantage in hanging the treadle in any way in the lower depending ends of the cross-brace, and whether or not a perfect and absolute alignment between the two bearings of the treadle was present in their machine, and whether or not such alignment was continued and assured in the practical operation of a machine.

So that there can be no possible dispute as to this matter, and to ascertain whether or not Cramer had really accomplished anything of utility as to the treadle-bearing devices of a sewing machine upon the theory his counsel now asserts, the Singer Company called all of the managers and agents of the leading sewing machine concerns as above indicated, having charge for the last twenty or thirty years of the sewing machines of their respective companies upon the Pacific Coast, and took the testimony of these parties as to questions of fact in distinction from theories. The testimony of all these witnesses was that there never was any trouble whatever, and never had been during the last thirty years, in the bearings of their treadles getting out of alignment, and no embarrassment or inconvenience whatever in the use of collars and set-screws in assuring such alignment, and that for thirty years past neither did, nor does now, any of these leading machines get out of alignment, nor do they get out of order, or make noise, etc.

A. T. Eggleston, manager of the Wilcox & Gibbs Sewing Machine Company at San Francisco, and familiar with that machine and selling it for twenty-eight years (Rec., p. 293), testified that the Wilcox & Gibbs machine for thirty years past never has had any vertical cross-brace connecting the two ends of the machine; that such brace was not necessary; and introduced exhibit

called "Defendant's Exhibit 13" as one of the original sewing machines used for thirty years, and sold generally throughout the United States. (Rec., p. 293.) Eggleston then testified that during that thirty years the treadle of the Wilcox & Gibbs machine had rested in recesses in the legs of the machine upon knife edges. (Rec., p. 293.) He was then asked:

> "Q. Have you ever known bearings of the Wilcox & Gibbs stand to get out of alignment with each other?
>
> "A. No, sir.
>
> "Q. Is it possible for them to get out of alignment with each other say while the machine is going?
>
> "A. I don't see how it is if the treadle rod is in, unles the treadle rod is bent. If the treadle rod is straight, I don't think it would be possible."

Mr. Eggleston then testified that the Wilcox & Gibbs machine brought a higher price than any other sewing machine sold in the market, and has been sold constantly in competition with all machines for thirty years. (Rec., p. 294.) Upon cross-examination Cramer's counsel attempted to show that the treadle in the Wilcox & Gibbs machine could be got out of alignment by the nuts on the ends of tie-bar holding the legs of the machine together becoming loose and permitting the legs to spread, and that you would have to tighten up the nut to prevent this. Of course exactly the same result would follow in the Cramer machine, and as to the Cramer treadle, if the nuts on the ends of the tie-bar holding it in place should work loose, the legs would spread, and the fastening blocks of the Cramer patent be kicked out by the treadle trunnions.

John W. Evans has been a dealer, representing the Domestic sewing machine upwards of thirty years; he

described during that time the manner in which the treadle of a Domestic sewing machine was hung, as follows:

> "The treadle is on V bearings resting on the treadle rod. There is a knife edge under the treadle, and a V-shaped groove in the rod in which the treadle oscillates, or with the collars on each side to keep it from moving sideways." (Rec., p. 285.) "The rod upon which the treadle rides in V-shaped groove is a tie-rod." (Rec., p. 285.)
>
> "Q. Is it possible as that is constructed, for the bearings of the treadle to get out of alignment with each other?
>
> "A. No, sir."

The witness also testified that there was never any trouble about noise in such treadle construction unless the collars slipped to one side, and that there never was any tendency for such slipping. (Rec., p. 285.) The witness also testified that prior to 1883 the conical-shaped collar fitted into a tapering hole in the treadle. Witness also testified that he had known the patentee Cramer since 1882; that Cramer then showed him his device and wanted him to get the Domestic Sewing Machine Company to adopt it, and that he talked with the officials of the company about it at New York in the year 1882, and that they would not consider it at that time. (Rec., p. 286.) The Domestic stand, with treadle, was introduced in connection with Evans' deposition, identified by him, and marked "Defendant's Exhibit 9." Cramer's counsel, upon cross-examination, attempted to prove by the witness that the set-screws would wear loose sometimes in running the machine, as follows:

> "X-Q. Those set screws wear loose sometimes in running the machine, do they not?
>
> "A. *I have not known them to in running the machine. No.*

"X-Q. I mean to say after the machine has been in operation a certain length of time, the set-screws become loose from their constant use, do they not?

"A. *There is no tendency there to loosen the set-screws, Mr. Miller.*" (Rec., p. 288.)

Wm. E. Jackson testified that he had been in the sewing-machine business for thirty years, dealing in the Davis machine, that had been upon the market for thirty years. (Rec., p. 297.) The witness introduced a machine marked "Defendant's Exhibit 15." That represents the style of treadle and machine used by the Davis Company for over thirty years. (Rec., p. 298.) He testified that the "treadle was hung on a tie-rod, with a cone on each side of it," and that it was "hung in conical bearings."

"Q. State whether or not you have any trouble with the bearings of the treadle, as shown in Exhibit No. 15, getting out of alignment with each other.

"A. I don't see how they can.

"Q. Have you ever known an instance in any case where the bearings of this Davis treadle, as shown in Exhibit No. 15, have got out of alignment with each other?

"A. No, sir; I have not."

C. A. Hawkins, general agent of the White Sewing Machine Company, San Francisco (Rec., p. 266), had handled and sold the White machine with the treadle hung in cones on the tie-rod, for about twenty years; about 1,100,000 of such machines sold. He testified that the White machine had been sold in competition with the Singer machine side by side since 1876. (Rec., p. 267.) He testified that he never had heard of such a thing as the treadle bearings getting out of line with each other on the tie-rod; that he had dealt largely in

second-hand machines, and certainly would have known of any such trouble had it existed. (Rec., p. 268.) He also testified that he could not see any advantage whatever in hanging the treadle in a cross-brace. (Rec., p. 267.)

Frederick S. Prescott, manager of the Wheeler & Wilson Sewing Machine Company in California, and in the sewing-machine business for thirty-six years; testified that the treadle is hung on rods with cones on each side (Rec., p. 275); and as to the matter of the treadle hung upon a tie-rod having its bearings in cones getting out of alignment the witness said:

> "It is not possible to get the treadle bearings out of alignment. I have never known any of these treadle bearings to get out of alignment. *I have never heard of any such thing as a treadle getting out of alignment in any machine.*"

After the witness had testified that the Wheeler & Wilson sewing machine stand had a vertical brace, he was then asked (Rec., p. 275):

> "Q. *Do you know of any advantage that there would be in hanging the tie rod on the bottom in the double brace instead of putting it in the web of the legs?*
>
> "A. *I don't see any advantage.*"

From the above facts, admitted, self-evident, and proven, three conditions are apparent:

1. That Cramer's invention, consisting in the *"construction and combination of parts fully described and claimed"* in his patent, is of more than doubtful capability of employment commercially, and represents and stands for simply an abnormal conception and arrangement of mechanical parts, and that simply the hanging of a sewing-machine treadle in the lower depending ends

of a vertical cross-brace of a sewing machine in itself is without added value or utility whatever.

2. That none of the leading sewing machine manufacturers selling their machines on the Pacific Coast, or indeed elsewhere, have ever, as a matter of fact, hung any of their sewing machines treadles in the lower depending ends of a vertical cross-brace.

3. Lastly, that of the millions upon millions of machines sold by these old standard sewing machine manufacturers upon the Pacific Coast, and elsewhere, in the last thirty years, there has never been the slightest trouble or complaint as to the treadle bearings getting out of alignment, when the treadle is mounted upon a cross-bar, or in the legs of any sewing machine; and that there never has been commercially and practically the slightest embarrassment or cause of complaint of noise, or otherwise, from the loosening of cones on the cross-bar carrying the treadle bearings of any sewing machine.

These facts being as they are, what possible ground of contention, equitably or otherwise, can there be that Cramer's patent is entitled to any broader construction than that which he himself has asserted his invention to consist in, namely, "the construction and combination of parts fully described and claimed."

The decisions of this court, cited by the Circuit Court of Appeals for the Ninth Circuit, and some pertinent decisions of this court bearing upon the rightful construction of this Cramer patent.

There is no more curious and seemingly grotesque condition connected with this whole litigation than that which is apparently represented by the decision of the Court of Appeals, and in the light of which they found

it necessary to justify the finding of the jury verdict in this case. The Court of Appeals say as follows (Rec., p. 459):

> "If the evidence was true that Cramer was the first to present a new and useful combination by mounting his treadle in the vertical cross-brace, thereby obtaining the advantages which some of the witnesses testified to, he was undoubtedly entitled to the protection of that combination, and *to the exclusive right to mount a treadle in the cross-brace, no matter what the form of the treadles might be.* This view is fully sustained by the general doctrine of the decisions: *Winans* v. *Denmead*, 15 *How.*, 330; *Ives* v. *Hamilton*, 92 U. S., 426; *Machine Co.* v. *Murphy*, 97 U. S., 120; *Hoyt* v. *Horne*, 145 U. S., 308."

An examination of the four cases in this court above cited seems to be without semblance of justification for the statement and finding of the Court of Appeals in this case, and if the rightfulness of such finding depends upon these cases, the error of conclusion is manifest. In no one of the above cases is it stated or intimated that because the patentee, or his assignor, was entitled to the protection of the combination identified by the relied upon claims disclosed by each of these cases, and where such combined claims were held to be valid, that each of said patentees was entitled to the exclusive right no matter what the forms of mechanical combinations might be. In each of the four cases above, this court found, and found only, that the devices and combinations proceeded against as an infringement of the specified claims, were either substantial reproductions, or plain mechanical equivalents of the parts constituting the combination of the respective claims. As, for example, in the case of *Machine Company* v. *Murphy*, 97 U. S., 122, the claim at issue was as follows:

> "Making a cutter which cuts the paper from the roll in such form that in cutting off the paper it cuts it in the required form to fold into a bag without further cutting out."

It appears by the decision that the patentee was the first person to organize an operative machine to make paper bags in this manner (p. 123); and it appeared that the entire machine would be without value except as to the devices of this claim (p. 126). The claim did not confine the invention to the devices exhibited by the patent; and this court found that the devices used by the defendant were clearly mechanical equivalents of the devices disclosed by the patent for carrying out the invention of this claim.

The citation of the case of *Winans* v. *Denmead* is indeed unfortunate as a reference to any question in this case. As to the subject matter involved in that case, this court says:

> "This patent was not for merely changing the form of a machine, but by means of such change to introduce and employ other mechanical principles or natural powers, or a new mode of operation, and thus attain a new and useful result."

In that case the words *"conical"* and *"cylindrical"* were used in describing the car body. The defendant's car body was constructed *octagonal* and *pyramidal*. The court held that the patentee did not contemplate a true circle; that a circle was made up of short lines, and found infringement, reversing the court below. It is a matter of interest even as to this case to note that the decision at the Circuit Court was reversed by this finding, and that Mr. Chief Justice Taney, together with three other of the justices, dissented from the above finding.

Again, the case of *Ives* v. *Hamilton*, 92 U. S., 429,

related to a patent having for its object mechanical means to produce a rocking motion of a saw in operation (p. 431), the old method of operating this kind of a saw being a direct up-and-down movement. The defendant sought to evade the charge of infringement by substituting guides that had the same effect as the curved guides of the patent and claim to carry out the invention, but not having the precise curved line of the patent. This court found infringement in that case, and that the two guides were mechanically equivalent, simply upon inspection, this court saying:

> "The substitution of guides at the top made crooked by a broken line instead of a curved line, is too apparent an imitation to need a moment's consideration."

Manifestly no such question is here present.

The case of *Hoyt* v. *Horne*, 145 U. S., 308, seems to to be a case where the patent related to a marked advance in the art in reduction of rags to pulp, the change being so marked, as represented by the patent, that—

> "The result of this (his invention) is such a greatly increased speed in the flow of the pulp that it is said to be brought in contact with the knives twelve times as often as was possible in the old tub or engine."

The defendant in that case had been a manufacturer of the patentee's machines; had had a disagreement with him, and had engaged in the manufacture of the machines of the patentee with only a slight change. As to this matter the court says:

> "The substitution of a vertical for a horizontal mid-feather at the inoperative end of the tub is merely the use of an old and well known mechanical equivalent, and obviously intended to evade the wording of the claims of the Hoyt patent." (P. 309.)

We respectfully submit that no case can be found in this court, nor do we believe any case at the Circuit, where invention is asserted by a patentee to consist in "the construction and combination of parts fully described and claimed," reference being had and made in the patent to the drawings to determine such particular construction and combination, and where such patent relates at most to a detailed improvement in an old mechanism as shown in the Cramer patent—that such patent has been treated as basic, or such patentee a pioneer in the art to which his patent relates.

It would seem that this court has never found patents to be basic, and the inventors thereof pioneers, unless in the first instance such patents and inventions had, as a matter of fact, made their record in that industry, and admittedly and provenly denoted the progress of science and the useful arts. In no single instance can it be found that any of the thousand and one inventions standing as improvements in old machines have ever been designated in any court as basic, or the inventors as pioneers. The conditions necessary to entitle a patentee to be called a pioneer, or his invention broad and basic, have been clearly defined, as we take it, by this court.

In the case of *McCormick* v. *Talcott,* 20 How., 405, this court says:

> "If the patentee be the original inventor of the device or machine called the divider, he will have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions by analogous means, or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such."

In the case of *Railway Co.* v. *Sayles*, 97 U. S., 554, this court, speaking upon this precise point, said:

> "In such cases, if one inventor precedes all the rest and strikes out something which includes and underlies all that they produce, he acquires a monopoly, and subjects them to tribute. But if the advance towards the thing desired is gradual, and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs."

In the case of *Morley Mach. Co.* v. *Lancaster*, 129 U. S., 273, the court says:

> "Where an invention is one of a primary character, and the mechanical functions performed by the machine are as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result, are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine.
>
> "Morley, having been the first person who succeeded in producing an automatic machine for sewing buttons of the kind in question upon fabrics, is entitled to a liberal construction of the claims of his patent. He was not a mere improver upon a prior machine which was capable of accomplishing the same general result; in which case, his claims would properly receive a narrower interpretation."

These are the three cases cited by the text-writers, as, for instance, Walker on Patents, Section 359 to 362, as fixing the right rule or guide, in determining whether or not a patent is a basic patent, or the inventor a pioneer; and these three cases have been so recognized as the authorities upon this proposition by the bar.

The Court of Appeals of the Ninth Circuit did not see

fit to cite either of these cases, nor could they justly, as applicable to this case; but did see fit to cite four cases of this court which, we take it, do not in any way stand as a justification of, or authority for, the actual finding made by that court. A decision of this court, since the three last cited, most tersely restates and epitomizes the rule of these decisions:

In *Miller* v. *Eagle Mfg. Co.*, 151 U. S., 207, where the court says as follows:

> "The range of equivalents depends upon the extent and nature of the invention. If the invention is broad or primary in its character, the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such inventions. The doctrine is well stated in *Morley Machine Co.* v. *Lancaster*, 129 U. S., 273, where it is said, 'Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine.'"

If we are right in our understanding and view of the authorities and decisions of this court, the opinion of the Court of Appeals of the Ninth Circuit is erroneous, and the result, conclusion and order of that court is as wrong as the opinion expressed.

The question of infringement of Cramer's first claim discussed specifically. Whatever construction may be put upon the Cramer patent there is absent from the Singer stand and brace, two of the elements identified by the Cramer patent and first

claim without any substitution of any mechanical equivalent therefor.

At the risk of repetition, we again present this question in detail under a different phase of discussion.

There cannot be any contest upon the proposition that two of the essential and controlling elements of the Cramer patent, and which are carried into and made a part of the claim itself, are: (1) the vertical double brace provided with holes, etc.; and (2) the trunnions.

The Singer or Diehl stand and brace absolutely and unqualifiedly is without either of these elements so far as its treadle relations are concerned; and as absolutely and unqualifiedly there is no mechanical equivalent or substitution therefor. These parts are simply and baldly omitted. The double vertical brace represented in his patent was old.

Cramer in his patent says that "'C' represents the usual cast iron double brace connecting the two ends diagonally in a plane generally vertical." He also designates the old common cross-bar and tie-rod at the base of every sewing machine as *"the common cross bar 'D.'"* He also says that "the treadle and its trunnion bearings are wholly independent of the cross bar 'D.'" It is entirely evident, then, that his invention has no relation whatever to the cross-bar, and is entirely independent thereof. It would appear to be quite certain, then, that if the treadle of the Singer or Diehl stand and brace is mounted in the cross-bar in distinction from the vertical cross-brace, it is a different and distinct thing from the device of the Cramer patent. It is entirely evident from an examination of the Diehl or Singer stand and brace that so far as the operative part of the treadle is concerned, the brace can be cut off at its point of junction

with the cross-bar, and removed entirely from the machine; and if the band or driving wheel of the Singer device was located upon the legs of the sewing machine as shown in the Cramer patent, the operativeness of the machine would not in any way be interefered with.

It would seem that nothing could be more certain than that if the vertical double brace of the Cramer machine were removed entirely and the treadle mounted as shown in the Diehl patent upon offsets in the cross-bar, or upon bosses or projections cast integral with the cross-bar, and extending upwards therefrom with screw threaded openings as shown in the Diehl patent, that such a device would bear no relation to the Cramer invention.

The contention of Cramer's counsel in now idealizing Cramer's supposed invention is, that Cramer's "invention" consists in taking the treadle out of and away from the old common cross-bar in and upon which it had commonly been hung, and then hanging the treadle in the old vertical double cross-brace. If Cramer's invention even thus wildly idealized was that he had found out that he could hang the treadle in the old double vertical brace instead of in and upon the old common cross-bar, there certainly can be no question of mechanical equivalency by still hanging the treadle on the old cross-bar in which it had from time immemorial been hung in a sewing machine.

Again, if Cramer's invention, as he says in his patent, "consists in the construction and combination of the parts fully described and claimed," and if he now says that such construction and combination of parts is his invention, even if applied in some manner to the old cross-bar, then there is absolutely no identity in the construction and combination of parts between the Cramer com-

bination and construction as shown in his patent and the cross-bar and treadle of the Singer or Diehl machine.

It is true that Diehl in his patent speaks of his unit and composite structure of cross-bar and vertical double brace as a "cross-brace," but this does not alter the fact that the old, usual vertical double cross-brace and the old, usual common cross-bar are simply cast together as one piece; that the treadle of Diehl's patent is mounted in this cross-bar is not only so described in the patent and shown in the drawings, but it is made the subject specially of the fifth claim, as follows:

> "Fifth. A cross brace for sewing machine stand having at its base a cross bar, combined with a treadle mounted in said cross bar, substantially as set forth."

It is true also that the Diehl patent provides that the cross-bar may be omitted, and the treadle hung directly on downward projections from the brace; but this construction is not present as an asserted infringement, and has no significance in the Diehl patent except in showing how the alignment of the band-wheel and treadle can be retained even if the cross-bar element of the brace should be partly omitted. The converse of the statement would be equally true, that the entire vertical cross-brace could be omitted and the band-wheel hung on the legs of the machine, as shown in the Cramer patent.

Again, let us take for another illustration as to this fact the treadle mountings used for thirty years, and present in court in machine form of the Domestic Sewing Machine Company, and described in full upon Record page 285, in the deposition of Mr. Evans. In this machine the treadle is mounted upon a cross-bar or tie-rod, and rides in a V-shaped groove in the cross-bar or tie-rod upon a knife edge, the knife edge being under

the treadle, and the V-shaped groove on the cross-bar or tie-rod itself. The treadle is held in place and to its bearings by a collar on each side that keeps it from moving sidewise, and does not permit it to "bounce or thump," as stated by Cramer. In the Cramer device there is a cushion block with upward and downward projections, at the end of the treadle bearings, which keep them in place when the legs of the sewing machine are put together; but in the Domestic sewing machine the treadle is mounted on a tie-rod or bar in a V-shaped groove upon it, with collars instead of cushion blocks to hold the treadle bearings in position and down to their work; and if, as now contended by Cramer, the taking of the treadle from the cross-bar or tie-rod and putting it in the vertical double cross-brace in the manner shown, was his invention; manifestly the mounting of the Singer treadle in the old cross-bar in any way could not be such invention in any respect.

TRUNNIONS.—The second element of Cramer's patent, and first claim made absolutely essential by the drawings, specifications and the claim itself, is the trunnions with which the treadle is provided, and which in the specifications it is provided that such trunnions are cast as a portion of the treadle. The outer end of these trunnions are fitted to and oscillate in such bearings. Even the word "fitted" as used in the first claim in connection with these trunnions is restrictive as well as descriptive, and must refer to the lower end of the "loop hole that is hollowed to an angle more obtuse than the edge of the trunnion, to serve as a bearing for the same, and permit the rocking motion common to treadles." It is this precise fitting that is referred to as a part of the claim.

Aside, however, from the relation of this fact to the claim, there is absolutely absent and wanting in the Singer or Diehl device trunnions of any kind, name, nature, or description; or any construction that can by any stretch of the imagination be considered or designated a mechanical equivalent therefor.

In the Singer or Diehl device, at the point upon the treadle at which appear the trunnions of Cramer, there is not only absent any trunnion or any other projection, but there is a small conical recess in the treadle itself. The treadle of the Singer device hangs and moves upon the points of two point-center screws or bolts, such bolts having conical shaped points that fit in to the conical shaped recesses in the sides of the Diehl treadle. There is nothing of any description that is interposed between the outside edges of the Diehl treadle and its small conical recesses and the off-set in the Diehl cross-bar on which the treadle is hung. There is not only no trunnion of any description cast with the Diehl treadle, or associated in any way with the Diehl treadle, but there is no room or place for any such trunnion. The point-center screws of the Diehl device are no part or portion of the treadle. In Cramer's device his trunnions must move with the treadle, and the treadle cannot move without the trunnions, nor the trunnions without the treadle; they of necessity oscillate with the treadle upon their knife edges, fitted as above indicated. The point-center screws that hold the Diehl treadle in place, and upon which it moves, are as fixed and rigid as if they were a part of the cross-bar. The Diehl treadle moves only upon its conical points. The bearings as to resulting effect and structure between the Cramer device and the Singer or Diehl are the direct antitheses of each other. In the Cramer bearing the V-shaped trunnions oscillate

and move in an arc of a circle and adjust themselves automatically by the wear of the separate parts, without any capability of adjustment sidewise. The point-center screws of the Diehl device do not oscillate; the bearing is oblique and endwise, and the wearing of the parts must be taken up, not automatically, but by the advancement of one or both of the screws; and the mere fact that both bearings, like the bearings of all sewing machines, must carry the treadle goes for nothing as to the matter of mechanical equivalence, for it is not sufficient that both bearings must do the work generally that is done in every sewing machine and necessary for the operation of the treadle, but they must do the same work in the same way.

The Cramer patent makes a clear distinction between the trunnion itself cast as a portion of the treadle, and the trunnion bearings. Cramer's patent distinctly states that his trunnions extend from the side of his treadle into the loophole in the common cast-iron brace "C." The trunnions are marked "B," and are plainly shown so extended between the treadle "A" and the brace "C" in the drawings. To make this difference between the trunnion itself interposed between the treadle and the brace and that portion of the trunnion to act as a bearing, Cramer says *"below the bearings of the trunnions* B" he attaches an oil-cup to catch the drip.

Trunnion. What is a trunnion, and has the term any significance or meaning otherwise than its commonly accepted meaning, and as used in the Cramer patent?

There is no question that the trunnion, whatever it is, is an element of Cramer's first claim. His patent from beginning to end identifies exactly and precisely what he

means by the "trunnion" of his claim. It is identified in the drawings by letter "B," and in no part of the patent is it suggested that these trunnions can be altered or changed in the least; and the patentee makes the further distinction between that portion of the trunnion cast with the treadle, and that portion of the trunnion which oscillates as a bearing in the loophole in the lower end of the brace. Wherever Cramer refers to this cast portion of the treadle extending into the loophole he refers to it as a "trunnion;" and wherever he refers to the bearing he refers to it as a "trunnion bearing." Cramer uses the words "trunnion" and "trunnion bearing" eleven times in his specification, as follows:

> "B represents the two trunnions (1) cast as a portion of the treadle, and extending from its sides into loop holes in the common cast iron brace C. These trunnions (2) are sharpened to an edge or corner along their lower sides, and the lower end of the loop-hole is hollowed to an angle more obtuse than the edge of the trunnion (3) to serve as a bearing for the same. The treadle and its trunnion-bearings (4) are wholly independent of the cross-bar D. Pieces of leather F, or other soft material over the top and end of each trunnion (5) to serve as cushions to keep the same close in its bearings, to prevent the noise which would result were the trunnions (6) permitted to bounce and thump endwise, when the treadle is in motion. The leather F is fitted to the curve of the upper side of the trunnion (7), which is an arc of a cylinder whose center of oscillation is the lower end of the trunnion. (8) The same leather also interposes between the end of the trunnion (9) and the adjacent iron. This block conforms to the back and top side of the cushion and fills the loop hole in the brace above the trunnion (10). Below the bearings of the trunnions B (11)."

The claim contains, as we say, the word "trunnion" but once, in the following relation:

> "1. The vertical double brace joining the legs of the two ends of a sewing machine, *provided with holes through its lower extremities to serve as bearings, in combination with a treadle provided with trunnions fitted to oscillate in said bearings,* substantially as specified."

It would seem from this that there could be no possible play of imagination as to what this patentee meant, and what his solicitors meant, by the use of the word "trunnions" in his specification and claim; and all of the detail of description in connection with the word "trunnion" shows that the inventor and his solicitor knew what they meant by the use of the word, and meant, and meant only, that the trunnion, and trunnion formation, and trunnion bearings, as disclosed by his specification and claim, and in the construction and combination there shown, was Cramer's invention; as is shown, for example, by one of the above quoted sentences in the specification, namely: "The leather F is fitted to the curve of the upper side of the *trunnion, which is an arc of a cylinder whose center of oscillation is the lower edge of the trunnion,*" and this is the trunnion contemplated in the claim "*fitted to oscillate in said bearings,* substantially as specified." Indeed, the whole specification is built around the fact that his two trunnions are cast as a portion of the treadle, and are to extend from its sides into the loopholes in the common cast-iron brace "C;" for after Cramer described exactly and precisely what these trunnions were, what they were intended for, and illustrated in his drawings their application, he then occupied nearly half of his specification with a description of the particular devices which he had found necessary to ally with his

trunnion construction and its combination with the other associate parts to make them operative.

What, then, is a trunnion? Two definitions of the word appear in the record as submitted to the jury, one from the Century Dictionary (Rec., p. 62):

> "1. One of the cylindrical projections on the sides of a cannon cast or forged in one piece with the cannon itself, which support it on its carriage. In the United States artillery service the diameter of the trunnion in smooth-bore guns has generally been equal to the diameter of the bore. See cut under howitzer.
>
> "2. In steam engines, a hollow gudgeon on each side of an oscillating cylinder, which supports the cylinder, and through which steam is received and exhausted."

And one from Knight's Mechanical Dictionary (Rec., p. 126):

> "Trunnion: 1. (Steam-engine.) One of the hollow axes on which the cylinder of an oscillating steam-engine reciprocates, and through which steam is received and exhausted.
>
> "2. (Ordnance.) One of the cylindrical projections from the side of a cannon or mortar which rests in the cheeks of the carriage, forming supports for the piece and an axis on which it turns during elevation or depression.
>
> "3. A general term for an axis of similar character to the above."

Webster defines trunnion as follows:

> "Trunnion: A cylindrical projection on each side of a piece, whether gun, mortar, or howitzer, serving to support it on the cheeks of the carriage.
>
> "2. A gudgeon on each side of an oscillating steam cylinder, to support it. It is usually tubular to convey steam."

Entirely confirmatory of the construction and operation of the trunnion itself, purpose and use, and distin-

guishing characteristics, is the testimony of Mr. Seely, expert for the Cramer patent, in this case, and as shown by the following question and answer (Rec., p. 136):

> "Q. Do you know of any instance in mechanics —where a device is called a trunnion unless it itself oscillates or revolves with another oscillating or revolving device which is supported by those trunnions?
>
> "A. No, sir; I do not.

As bearing entirely upon this point under discussion, this same expert, when pushed to a direct answer as to whether or not there was any trunnion construction or operation present in the Diehl or Singer device, testified as follows (Rec., p. 138):

> "Q. Then you do not find in the defendant's machine any device that operates as a trunnion operates, do you—that is, by oscillating with the treadle?
>
> "A. No, sir; I do not."

There being, then, absent from the Singer or Diehl device any trunnion of any description, or any device that operates as a trunnion, as sworn to by the expert for the Cramer patent, and there being absent from the Singer or Diehl stand or device any extension whatever fixed or movable from the side of the treadle, and such treadle only resting and riding upon the ends of fixed-point center screws, entering a recess in the sides of the treadle—it would seem to be unquestioned that there is absent entirely the trunnion element of Cramer's first claim from the defendant's device, and that there has been no substitution of any device or element of any description, mechanical or otherwise, therefor.

In the case of *Pettibone* v. *Stanford*, 48 Fed. Rep., 302, where the opinion was given by the late Judge Gresham,

and afterwards confirmed and adopted by the Court of Appeals for the Seventh Circuit, the exact question as to the presence and definition of the word "trunnions" in the claim of the patent was passed upon. In that case the claim contained as one of its elements "trunnions working in journals at the tops of the arms;" and an attempt was made in that case to cover a device where the trunnions did not work in journals, but were rigidly united to the journals, and worked in an opposed part, the court said:

> "Trunnions working in journals cannot mean trunnions rigidly united to the journals. . . . The complainants' expert in effect eliminates from the claim words which are not at all ambiguous, but have a clear and distinct application, and imports into it language which is unwarranted by the specification. . . . The language of the claim is explicit and clear, and the court is not at liberty to enlarge it beyond its plain scope; nor can the complainants be allowed to show by experts that the invention is broader than the terms of the claim."

Controlling words of limitation and description of Cramer's first claim without relevancy or application to the Singer or Diehl device.

There are several identifying and descriptive words that are essentially matters of identification and limitation of the structure identified by Cramer's first claim, that show the impossibility of any analogous construction in the Singer device, and the impossibility of such words of limitation and description being applicable to the Singer devce.

The words "holes through" the lower extremities of Cramer's double brace in the first claim have a particular and peculiar significance and meaning, without which the

device itself would be without utility or capability of operation. There must not only be holes in the lower extremities of Cramer's double brace to serve as bearings, but the "*holes*" must be "*through*" these extremities. If the "holes" were not "through" the lower ends, the Cramer combination, as shown in his patent, would be an impossibility for two reasons: (1) Because the bearing ends of the trunnions could not be placed in the holes; and (2) because the treadle bearings, after being placed in position, could not be held and fastened in place and made operative unless the cushion block could be inserted in the "holes" from the outside of the brace to furnish a side and top backing and cushion for the ends of the trunnion, and to keep it down to its work.

There are no holes through any part of the cross-bar of the Singer or Diehl construction that serve as bearings of any description, or which can by any possibility be mistaken for any such purpose.

Again, the words "fitted to oscillate in said bearings," as used in Cramer's first claim, have a peculiar and particular limitation and significance as there used. Cramer's trunnions have to be "fitted" to oscillate in their bearings. The specification shows how they are fitted; that is, the trunnion bearings are made V-shaped to oscillate upon a knife edge; the "holes" are "hollowed to an angle more obtuse than the edge of the trunnion, to serve as a bearing for the same and permit the rocking motion common to treadles;" and the trunnion bears against a cushion block that fills the hole immediately above the trunnion, as shown in Fig. 2. This shows fully and entirely what is meant by the term "fitted to oscillate in said bearings," as set forth in said claim.

While in technical language, the long vertical loops,

which are the "holes" in the lower extremities of the cross-brace, are not confined to the descriptive words of the claim to "long vertical loops," still these "holes" are confined to such particular construction, and their form must be read into the claim for two reasons: First, because these long vertical loops must be of this character to " permit the entrance of the treadle," and it is so stated in the specification; second, because Cramer's first claim claims these "holes substantially as specified."

None of these characteristics, limitations, and necessary restrictions placed by the patentee upon his first claim are found in the Singer or Diehl device; nor any construction and combination of parts "fully described and claimed" of the Cramer patent, that can by any possibility be mistaken for them.

The changes in treadle arrangement that the Singer Company made in adopting the Diehl stand and treadle, shows that there is no relationship between the invention of Cramer and the invention of Diehl.

The stand and treadle used by the Singer Company prior to its adoption of the Diehl device shows the natural change that must be made in adopting the Diehl invention of hanging the treadle on the cross-bar, and the driving wheel in a loop in the vertical cross-brace cast as a unit connection with the cross-bar, to assure an alignment of the pitman connection.

The Singer stand and treadle prior to the Diehl device consisted of the usual vertical double cross-brace of sufficient strength to hold the stand together without the cross-bar. The treadle of that stand was carried by point center screws passing through the web of the legs, and

the treadle had a long arm from each side cast solid with it, the point center screws passing into recesses in the ends of the arms.

In adopting the treadle and brace of the Diehl stand, the Singer Company, to secure an alignment of the pitman (the essentiality of the Diehl device) cut the treadle arms off completely and entirely from the treadle, made a cone-shape recess at the sides of the treadle at the points where the rteadle arms were cut off, and then used the same point center screws they had used in their old device, upon which to mount and swing the treadle. In doing this, and in making these changes, there was an evident impossibility of their adopting the "construction and combination of parts fully described and claimed" in the Cramer patent; and they necessarily, in fact, employed, as to purpose, object, function and result, the exact antithesis of those parts without a semblance of parallelism between the two, and having nothing in common, except the treadle motion present in every sewing machine manufactured from the beginning.

We respectfully submit, therefore, that not only is there absent from the Singer or Diehl device, stand and brace, two of the essential elements of Cramer's first claim, namely, the vertical double cross-brace and the trunnions, and that there is no substitution of any mechanical element or device of any nature or description therefor; but that the presence of several words of description and limitation appearing in the claim as above presented and discussed simply make it impossible that infringement can be found in the structure represented by said Singer or Diehl stand and treadle.

Under the construction, contended for the Cramer patent by his counsel, such patent represents a mere aggregation and not a patentable combination.

We have thus far laid no stress upon the question as to whether or not the particular devices exhibited by Cramer's patent discloses patentable novelty or invention or even an improvement. We have not considered that it was necessary to discuss this question in view of the fact that the Singer or Diehl device is so widely different therefrom as to bar any contention of infringement of Cramer's first claim; but if Cramer's patent is to be construed so broadly as to mean the hanging of a sewing-machine treadle in or in connection with the lower depending ends of a vertical cross-brace by any means and in any manner, then we respectfully submit that such patent and claim represent a mere aggregation of parts, instead of a patentable combination of operative elements.

There is certainly no joint action between Cramer's fixed and immovable vertical double cross-brace, as a brace, and his treadle, oscillating upon knife edges formed upon the outer ends of trunnions cast solid with the treadle, and the whole dropped into position in the holes in the ends of the vertical cross-brace. Indeed, there is no new action or alliance, broadly, by this combination. Whatever action there was was the action of the treadle, the band-wheel and the pitman; and this action was not new, but was the same action that was present in all of the sewing machines going before Cramer. The most that even Cramer claims for his construction is an asserted improvement of detail construction over old mechanical devices long used for the same result.

Cramer nowhere claims any new result as to kind, and at the most, only as to degree. Whatever may be the contention for the Cramer patent, as to the wildest and broadest assertion made for it, to the extent even of the exclusion of all its limitations and terms, such contention only goes to the degree of improvement, and not to any new kind of result, and would therefore appear to bring the patent thus construed under a long line of decisions of this court, finding the invalidity of patents where there is no new joint action or result produced by the combination of elements, and that such combination stands for merely an unpatentable aggregation of parts, without dependence of such parts as to action the one upon the other.

In this view of the Cramer patent, the case in this court of *Wright* v. *Yeungling*, 155 U. S., 47-53, well describes such condition and conclusion as applied to this Cramer patent, namely:

> "The cylindrical guide performs the same functions as the prior patents; the trough, in which the connecting rod works in the Farrar patent, is practically the same as in the Wright patent, and the combination is a mere aggregation of their respective functions. If the combination of the trough and cylindrical guide of the Wright patent *gives greater lightness and strength to the frame than the combination of the trough and the flat guides of the Farrar patent, it is a mere difference in degree, a carrying forward of an old idea, a result, perhaps, somewhat more prefect than had theretofore been attained, but not rising to the dignity of invention.* We have repeatdly held patents of this description to be invalid. *Stimpson* v. *Woodman*, 10 Wall., 117; *Smith* v. *Nichols*, 21 Wall., 112; *Guidet* v. *Brooklyn*, 105 U. S., 550; *Halls* v. *MacNeale*, 107 U. S., 90."

The fact that the Singer or Diehl device is manufactured strictly and entirely under and in accordance with the Diehl patent, strongly presumptive of the fact of non-infringement, and persuasive evidence that such device is a new and different invention, and the jury should have been so instructed.

As has been repeatedly called to the attention of your Honors, and as to which there is no contention, that the single device proceeded against as an infringement of Cramer's first claim in this case is the exact and precise device shown, described and claimed in the Deihl patent. The plaintiff in error, Singer Company, justifies and defends under such patent in its answer, admittedly so shown and proof taken. (Rec., p. 20.) A series of in-instructions drawn in behalf of the plaintiff in error founded upon this fact were asked for and refused by the trial judge, such instructions being 36, 37, 40, 41, 42, and appearing upon pages 442-4 of this Record.

These instructions were drawn to cover and express the different applications of the rule as laid down by this court, and founded upon such fact, to the effect that the patent manufactured and justified under is *prima facie* evidence of the truth of the facts asserted in it, and *prima facie* evidence that the device manufactured under such patent is not an infringement of a previously granted patent sued upon.

All of Plaintiff-in-error's instructions as to this matter were refused. Instructions 37 and 40 fairly state the rule as asked, as follows:

Refused instruction 37.

"The jury are instructed that the defendants' patent is *prima facie* evidence that the alleged inven-

tions which are covered by its claims were new and useful when they were made by said Philip Diehl, the plaintiff's assignor, and in this respect the defendants' patent is *prima facie* evidence for the defendant to the same extent as the plaintiff's patent is *prima facie* evidence for the plaintiff."

Refused instruction 40.

"As to whether the sewing machine stands which have been made, used and sold by the defendant are covered by the claims of the Diehl patent or not is an important question in the decision of this case. Because in so far as the claims of the said Diehl patent cover the construction or combination of mechanical devices shown therein, the said patent is *prima facie* evidence that such construction and combinations do not infringe upon any prior patent. The construction and combinations that are covered by the claims of the said Diehl patent constitute a decision of the Patent Office that the same were, when the patent was granted, both new and useful, and also that said Philip Diehl was the first and original inventor thereof;"

which said instruction the court refused to give as requested.

It is difficult to conceive why these instructions were refused under any and all of the decisions of this court bearing upon this precise subject, and it is indeed equally difficult to understand why the following excepted to, instruction was given by the court, instead of all the instructions asked by plaintiff in error upon this point. the court instructing as follows, in exception 64. p. 450:

Court's instruction 64.

"If you determine that the Diehl structure is in some respect an improvement, but not otherwise an infringement of Cramer's patent, the fact that the

> patent was issued to the defendant for the Diehl structure subsequent to Cramer's patent will afford no protection to the defendant against the charge of infringement. It very frequently happens that after a patent is issued to one person another may subsequently secure a patent as an improvement upon the first, but such subsequent patent affords no protection to the holder thereof against the charge of infringement of the first patent if, as a matter of fact there be an infringement."

What the jury could understand from an instruction of this kind, it is difficult to conceive; but that they could not understand from such instruction that the issue of the Diehl patent raised a like presumption in its favor as the issue of the Cramer patent, and that the devices of the Diehl patent were presumptively not an inringement of the Cramer patent thereby is certainly manifest.

The earliest annunciation of the rule of this court is found in the case or *Corning* v. *Burden*, 15 How., 252, 271, where Mr. Justice Grier, speaking for the court, after referring to the fact that patents are only granted "after an inquisition or examination, made by skiliful and sworn officers, appointed for the purpose of protecting the public against false claims or useless inventions," said:

> " Consequently such a patent may be, and generally is, received as *prima facie* evidence of the truth of the fact asserted in it. And in cases where the evidence is nicely balanced, it may have weight with a jury in making up their decision as to the plaintiff's right; and if so, it is not easy to perceive why the defendant who uses a patented machine should not have the benefit of a like presumption in his favor, arising from a like investigation of the originality of his invention, and the judgment of the public officers, that his machine is new, and not an infringement of the patent previously granted to the plaintiff."

Since this decision the rule there declared, has been

applied and appears in many subsequent cases. A more recent statement of the rule appears in the case of *Boyd* v. *Jansville Hay Tool Co.*, 158 U. S., 260, 261, there the court speaking through Mr. Justice Shiras, adopts the language of Mr. Justice Strong in *Pavement Co.* v. *City of Elizabeth*, 4 Fish., 189, as follows:

> "The grant of the letters patent was virtually a decision of the Patent Office that there is a substantial difference between the inventions. It raises the presumption that, according to the claims of the latter patentees, this invention is not an infringement of the earlier patent."

The rule as thus stated by this court is recognized by the leading text writers (Robinson on patents, pp. 1016, 1041.)

Many important and leading cases can be found at the circuit showing the observance and application of this rule. In the case of *Ney* v. *Ney Mfg. Co.*, 69 Fed. Rep., 405, 408, the Circuit Court of Appeals for the Sixth Circuit, speaking through Judge Taft, said:

> "Though the patents were not pending in the office at the same time, the presumption from the granting of the second patent in view of the previous issue of the first, would not seem to be different."

In *Powell* v. *Leicester Mills Co.*, 103 Fed. Rep., 476, 487, at the circuit, Judge Gray thus stated and recognized the rule:

> "These patents were granted to defendant two years and four months after the date of the patent in suit. The grant is to be presumed to have been made after a full examination by official examiners, with the prior state of the art fully in view, especially as the same is shown by previously granted patents. There can be no reason why the presumption of validity and non-interference with any prior patent should not obtain as strongly in defendant's favor as

> it does in favor of the patent in suit. In considering the weight of the testimony, as to all points bearing on the question of infringement, this presumption must be kept in view. The cases cited by counsel for the defendants in this regard fully sustain this proposition."

Also in the case of *Illinois Steel Company* v. *Kilmer Mfg. Co.*, 70 Fed. Rep., 1012, 1015, Judge Townsend tersely states the rule thus:

> "The grant of this latter patent for a machine designed to accomplish the same result as that of the patents in suit raises the presumption that there is a substantial difference between them, and that the latter is not an infringement of the earlier patents."

We cite these decisions of the lower courts because the respective Judges delivering the opinions seem to have given careful and unusual attention to the facts submitted. Can anything be more apparent in this case than the fact that the skillful and sworn public officers who granted both of these patents (Cramer and Diehl) did not and could not have had the faintest suspicion that there was anything in common between the two patents, or that one was in any conflict with the other, or in any way related to each other, except generally as to the common subject matter, of a multitudinous class in the Patent Office? And finally, could the jury have had the faintest suspicion from the court's instruction 64 above quoted, that the issue of the Diehl patent, was *prima facie* evidence of its validity and *prima facie* presumptively that it was not an infringement of the Cramer patent, and that the grant of the Diehl patent was virtually a decision of the Patent Office that it differed substantially from the invention of Cramer's patent, and was not an infringement thereof?

The court took from the jury by this instruction the

right of presumption going to Diehl by reason of the issuance of his patent. Indeed the jury must have understood from the court's instruction 64 that there was no presumption whatever as to the matter of infringement, or even as to the validity of the Diehl patent, or the fact of the non-infringement by the Diehl structure of the Cramer patent. The court starts out with the proposition to the jury that they must first determine whether the Diehl structure is an improvement at all saying nothing about the Diehl patent; and the instruction seems to be deliberately and carefully drawn so as to avoid any instruction to the jury, that by reason of the *prima facie* presumption in favor of the Diehl patent, the device of that patent is not an infringement of the Cramer patent; and this in the face of the fact, that the burden of proof establishing infringement is upon the plaintiff. *Agawam Co.* v. *Jordan,* 7 Wall., 583; *Seymour* v. *Osborne,* 11 Wall., 516; *Fuller* v. *Yentzer,* 94 U. S., 288; *Imhauser* v. *Burke,* 101 U. S., 647.

The action of the trial Judge in giving the instruction that he did in this case, and in refusing the instructions asked by the Singer Company, Plaintiff-in-error, and the action of the Court of Appeals in refusing to disturb the ruling of the trial Judge in this matter, is all the more inexplicable for the reason that the court itself had recognized and laid down, and enforced this rule of right in the most comprehensive and positive manner, and had reversed the judgment of the trial court in another case and remanded the case for a new trial by reason solely of the misapprehension of the trial court as to such rule. In the case of *Ransome* v. *Hyatt,* 69 Fed. Rep., 148, the Court of Appeals of the Ninth Circuit, speaking upon this precise point, says:

"The only assignment of error necessary to be considered is the refusal of the court to instruct the jury concerning the effect to be given to the fact that a patent had so issued to the defendants. . . . The recent cases, however, of *Miller* v. *Manufacturing Co.*, 151 U. S., 208, 14 Sup. Ct. 310, and *Boyd* v. *Tool Co.*, 15 Sup. Ct. 837, citing *Pavement Co.* v. *Elizabeth*, 4 Fish. Pat. Cas., 189, Fed. Cas. No. 312, expressly affirm the doctrine of *Corning* v. *Burden*, and hold that the issuance of the defendant's patent creates a *prima facie* presumption of a patentable difference from the prior patent of the plaintiff. The Plaintiff-in-error was entitled, therefore, to an instruction which would permit the jury to consider the presumption that the law creates from the fact that a patent has issued in any case. The judgment will be reversed at the cost of the defendant in error, and remanded for a new trial."

The doctrine of mechanical equivalence, broadly, without any opportunity of application in this case —the opinion of Cramer; of no consequence upon the question of infringement.

We think we have shown clearly to your Honors that this Cramer patent, construed, as it must be, in the light of the file-wrapper and contents, shows only a patent and a claim for a special construction and arrangement of devices, and that from the face of the patent itself it is so limited and prescribed that nothing can come within the terms of its specification or claim, except those devices identified thereby. So understood and so construed, there can be no possible assertion that the Singer devices come under any description in the Cramer specifications, or can be identified in any way by his first claim. The sewing machine itself, as a structure, has been the subject of a more wide range of patents upon every part thereof than

any other single machine used in the industrial arts. Their issue has been simply nebulous. It has scarcely been possible in this generation of men that anything in the shape of a pioneer or primary invention or patent could be obtained upon a sewing machine, or that any construction can be given to any sewing machine patent broader than the special devices included in the patent, even and although the patentee has so attempted to claim in the patent itself. In the case of *Standard Sewing Machine Co.* v. *Leslie,* 78 F. R., 329, the Court of Appeals for the Seventh Circuit, speaking upon this precise point, says:

> "It is matter of common knowledge that for many years sewing machines of many and different modes of operation had been in use and were upon the market, so that it was questionable whether in the then state of the art improvements could be effected which could be properly classed within the domain of invention, or be deemed other than mechanical equivalents."

A reading of Cramer's deposition shows that in his entire testimony he made no reference whatever to his patent and the invention therein shown and described to the jury, except when forced to by interrogating counsel. The whole burden of his song was that his invention consisted in the hanging of his treadle in the lower ends of the cross-brace, and that it made no manner of difference as to the mechanism by which such treadle was hung.

We respectfully submit that, under all authorities, Cramer cannot be permitted to abandon his invention, as shown and expressed in his patent and identified by his claim, or give any other construction to it than that which is justified on the face of the patent itself, and in the light of the file-wrapper and contents. The wisdom after the event cannot be invoked by Cramer at this day. It is not what Cramer *says now,* but what he *said then* that gov-

erns; it is not what Cramer *does now*, but what he *did then*, as shown by his patent, that governs. The law upon this subject is well expressed in the case of *Foss* v. *Herbert*, 2 Fish., 31, where the court says:

> "The theory of the patentee and his opinion as to his invention, is of no consequence upon the question of infringement."

If there should be any doubt in the mind of the court after construing this patent, as to whether or not under any construction given, the device of the Singer Company can be swept under Cramer's first claim, we earnestly again call the court's attention in this connection to the unbroken line of decisions to the effect that the act of infringement is a tort or wrong, and that the burden of proof is always upon the plaintiff and never shifted, to establish such fact of infringement.

Seymour v. *Osborne*, 11 Wall., 516.
Fuller v. *Yentzer*, 94 U. S., 288.
Imhauser v. *Buerk*, 101 U. S., 647.
Agawam v. *Jordan*, 7 Wall., 583.

Two rules of right, and of guide, as laid down by this court, clearly indicate the impossibility of invoking the doctrine of equivalence in any other than in a narrow and restricted sense in this case. In the case of *McCormick* v. *Talcott*, *supra*, this court said:

> "The inventor of the first improvement cannot invoke the doctrine of mechanical equivalence to suppress all other improvements which are not merely colorable invasions of the first."

Bearing in mind, also, that Cramer's invention, as stated by him in his patent, consists in "The construction and combination of parts fully described and claimed," the question of infringement is disposed of by the state-

ment of the rule in *Prouty* v. *Ruggles,* 16 Peters, 341, where this court says:

> "It is not the same combination if it substantially differs from it in any of its parts."

This record is absolutely barren of any proof, reliable or even plausibly speculative, showing, or tending to show, that Cramer has suffered any damage whatever by reason of any act or thing done by the Singer Company, and therefore the jury should have been instructed to find nominal damages only.

It is earnestly contended that there is not even the scintilla of proof found sufficient in the earlier cases to support the verdict of the jury—in this record—to establish the fact that the defendant in error, Cramer, has suffered any damage of any kind, name, nature or description by reason of any act or thing done by the Singer Company, as disclosed by this record.

The Cramer patent contains two claims. There was no contention at the trial of the case that the second claim had been infringed by the Singer Company. Such contention, although made in the declaration filed, was withdrawn by Cramer's counsel before the opening of the case to the jury. (Rec., p. 36.) Aside, then, from the fact that there is no testimony in this record showing any damage, actual, or speculative, accruing to Cramer by reason of any act of the Singer Company, this fact and condition is intensified and made certain by the admitted fact that there was no contention that the Singer Company had infringed Cramer's second claim. The unqualified and uncontradicted testimony itemized and in detail in this case, from the lips of Cramer, repeated time and

time again, and from the uncontradicted testimony of the officers and managers of the Singer Company having knowledge of the fact, make certain and give ample reasons therefor, that it was simply an impossibility for Cramer to have been damaged in any way by any act or deed of the Singer Company, relating to his patented invention—and that he never was so damaged in any item or particular.

Several instructions were asked by the plaintiff in error, the Singer Company, and refused by the court, founded upon these facts and conditions in the record. Such refused instructions, with the exceptions thereto, are represented by exceptions 24 and 25 (Rec., p. 404-5), and are the requested instructions to the jury to find nominal damages only, as follows:

> "24. It is admitted by the plaintiff that there has not been any infringement by the defendant of the second claim of the patent. Damages are now claimed for an alleged infringement of the first claim of the patent only. The jury, therefore, should not pay any attention to the second claim of the patent, but should decide the case just as though that claim were not in the patent at all.
>
> "25. The plaintiff has not introduced any evidence tending to prove any damages that have resulted to him from any infringement of said first claim alone. If, therefore, you should find that said first claim had been infringed by the defendant, the damages assessed should be nominal, that is, one dollar, and no more."

The contention is in behalf of the plaintiff in error not only that Cramer has not introduced any evidence tending to prove any damage that has resulted to him from any infringement of his first claim alone, but that there is no proof or evidence present of any damage of any description to the plaintiff Cramer as to either of the claims,

or that he has suffered any damage of any description. The only testimony in this case as to this matter of damage was the testimony of Cramer alone, and possibly the testimony of his son and daughter, who were children at the time of the supposed happening of the events. Cramer's own uncontradicted testimony shows that he was simply a dealer in a small way in new and second-hand sewing machines, and that he was not a manufacturer, and that he treated the alleged inventions of his patent simply as an attachment to a sewing machine, which could be put in and taken out of all of the different types and styles of sewing machines manufactured at that time. There is no testimony in this case from any party who ever cast any of the parts of Cramer's devices, as shown by his patent, that such devices were ever cast, much less that they were ever put into a sewing machine. No dealer in sewing machines was called who ever saw, or knew of the devices of Cramer being put into any machine. No user of any machine was called by Cramer as a witness who testified even to the presence of the device in his machine. As above stated, the entire testimony as to these matters was confined to Cramer and his two children. Cramer's testimony shows that he never had but two sets of castings made containing his supposed inventions; the first set of six or seven cast in January, 1881; and the other of thirty-five or forty, early in the year 1883; and that the entire number of such castings containing his inventions put in machines was between thirty-five and forty; that he first commenced selling machines having his patented device in them in the year 1881, and ended in the year 1885.

We propose, in the discussion of this subject, under several different clauses immediately following, to present every word of testimony of Cramer in this case, or

of his son or daughter, having any relevancy to this question of damages; and it needs simply a reading of this testimony to furnish absolute conviction of the statement that this record is barren of any proof or testimony showing any damage to Cramer by any act of the Singer Company but upon the contrary otherwise. We again use the italics to bring into notice particular statements of Cramer in connection with the same testimony offered hereafter to enforce different contentions.

The testimony of Cramer shows that he positively finally ceased the selling of any sewing machines with his brace therein in the year 1885, and that in all probability he ceased any attempt to sell his braces in sewing machines in the year 1884. Cramer testified positively and unequivocally to these facts and dates in detail, having the receipts which identified the dates of the manufacture and casting of the braces, and he testified to these facts not only upon the direct examination by his counsel, but over and over again at different times in his cross-examination, and we here quote in full from his testimony such questions and answers as make absolutely certain and assured these facts, as follows:

"Q. *I say, you commenced selling your patent in 1881?*

"A. *Yes, sir.*

"Q. *And you continued to manufacture them until some time in 1885, when you stopped?*

"A. *Yes, sir; that is right.* (Rec., p. 45.)

"Q. *How many machines did you say you succeeded in selling with your treadle arrangement in it with those trunnions and knife edges in it?*

"A. *Between twenty-five and forty.*

"Q. How many years did you have them on the market?

"A. I had them manufactured, the bulk of them I had manufactured in 1883 at the O. K. Foundry. (Rec., p. 77.)

"Q. When did you first put in any machine such a combination as is described in your patent?

"A. In 1880 had it all complete.

"Q. When did you first commence *selling machines having that combination?*

"A. *In 1881.*

"Q. For how many years did you continue to sell them?

"A. *From 1881 up to about 1884,* or somewhere along there, 1884-1-2, or somewhere along there—until they came up there with theirs.

"Q. *Yes, but in that four years' time you sold between thirty-five and forty?*

"A. *"Yes, sir, that is it."* (Rec., p. 79.)

"Q. How many sewing machines did you sell all together during that time, those that did have your patented device, and those that did not?

"A. I could not tell you. I think I sold about—well, *from about ten to eighteen a month.*

"Q. All together?

"A. Yes, sir.

"Now understand me. In 1883 I came down here and I had these castings made at the O. K. Foundry, and then I shipped them up to Sonora, and then I put them on machines *and sold them very rapidly, had no trouble in selling them at all."* (Rec., p. 80.)

"Q. You averaged about one a month that had this combination with your patent in, while you were averaging from ten to eighteen a month all together?

"A. *I sold them in a little while after I had them cast. It did not take me long to sell them.* I did not sell them so many a year." (Rec., p. 79.)

"Q. You had your patterns made so you could get castings during that entire four years?

"A. *Yes, sir.*

"Q. You were selling machines at the rate of ten or eleven per month?

"A. Yes, sir.

"Q. *Yet in all that time you only sold thirty-five or forty machines of your patented device?* (Rec. 80.)

"A. *Yes, sir.*

"Q. *When did you sell these thirty-five or forty machines?*

"A. *In 1883 I had those manufactured at the O. K. Foundry on Mission Street, and then I took them up there, and I don't know how long it took, but not long, to sell them off.* (Rec., p. 81.)

"Q. How many sets of castings for this Cramer combination did you have made in 1883?

"A. *There were thirty-five or forty of them made in 1883.*

"Q. How many did you have made before 1883?

"A. *Oh, I don't know; six or seven or somewhere along there. . . . The first one was cast in January 1881.*

"Q. Do you know how many sets of castings for this combination you had made in 1881?

"A. I don't know—four or five—somewhere along there. . . .

"Q. When did you sell those six or seven machines that you first put the combination in?

"A. *I could not give you the date now, just exactly when.*

"Q. *Along in what years?*

"A. *I sold them that year.*

"Q. *1881?*

"A. *Yes, sir.* As near as I can remember, I sold them that year.

"Q. When did you take any further steps to have any more castings made?

"A. In 1883 I came to San Francisco, and I had this lot cast.

"Q. What time in 1883 did you get those castings?

"A. I don't know whether I have got the receipts with me or not, but *I think it was in the early part of 1883.*" (Rec., p. 82.)

The testimony of Cramer himself shows conclusively that since the year 1885 he never even attempted to sell a sewing machine in which he put a brace with treadle hung as shown in his patent. The truth of this fact appeared several times in his testimony when the direct point was

not in his mind, as exhibited by the following questions and answers:

"Q. What was the highest price you sold one of these machines for in 1885 or 1886 that did not have your treadle in it?

"A. I think I was pretty well run out of the business at that time. I could not tell you. Yes, I was pretty well run out of the business. I don't know whether I sold any that year.

"Q. *Did you sell any in those two years?*

"A. *I don't believe I did.*

"Q. Do you know when you sold the last machine that had your treadle in it?

"A. *About the year 1884 or 1885.*"

We therefore say that several facts and conditions of controlling importance are made absolutely certain by Cramer's said testimony, viz.:

First, that between the years 1881 and 1885 Cramer had manufactured and cast not to exceed forty of his combined braces and treadles.

Second, that this number of braces and treadles were manufactured or cast at two different times in two lots; the first lot, four or five in number, in the year 1881, and the second lot of thirty-five or forty in the year 1883.

Third, that Cramer sold the first lot of four or five treadles in that same year, 1881, the same year he had them cast, and that he sold the second lot that he had cast in the year 1883, *"in a little while after I had them cast in the year 1883."*

The above was the extent of the *"business"* that Cramer had built up between the years 1881 and 1885, as clamed by himself, in his combined treadle and brace, and the above is the *"business" and "business" only* that the Singer Company is alleged by Cramer to have interrupted and the damages to such *"business" alone* that the verdict of $12,456 of this jury is founded upon.

Nothing is more positive from Cramer's testimony than that he never cast, or attempted to have cast or manufactured, any other lot or batch of castings of his combined treadle and vertical cross-brace after the lot or batch that he had cast at the O. K. Foundry on Mission street, San Francisco, in the early part of the year 1883; and that he put all these castings of cross-brace and treadle in sewing machines immediately after their casting—*"I sold them a little while after I had them cast." "It did not take me long to sell them,"* says Cramer. And it is absolutely certain from Cramer's testimony that the first batch of castings, four or five in number, of his brace and treadle that he had cast in the year 1881 were sold in the year 1881—*"I sold them that year,"* testifies Cramer.

It is true that Cramer *says* he continued to sell these thirty-five or forty treadles and stands until "they (Singer Company) came there with theirs;" but this statement of Cramer's is manifestly a ridiculously untrue assertion without any foundation as to fact, and in direct contradiction of all the facts testified to by him. Such statement represents simply an expressed conclusion upon his part, and is as incongruous and unnatural as that other statement and conclusion asserted to be made in the same locality about the date of the grant of this Cramer patent, that "we are ruined by Chinese cheap labor."

Cramer seemed to understand well the significance and importance of the statement appearing in this record that the reason he never had any further set or lot of castings made of his brace and treadle after the early part of the year 1883 was because the Singer Company came up in his part of the country with machines having therein the Diehl brace. We shall show hereafter by undisputed testimony the unfortunate character (for Cramer) of this

assumption; but the supposed relevancy by Cramer of this condition as a necessary fact to appear in this case seems to have been well understood by him. Cramer, however, made one serious mistake in stating this conclusion or opinion as a relevant fact, in this: That he supposed he was safe in fixing the year 1884 or 1885 as the last year in which he sold his treadle and brace, because the Diehl patent was granted in the year 1884, and it would take about that length of time after such grant for the Singer Company to get its machines having the Diehl brace upon the market in California, and that therefore he would be perfectly safe in fixing that date as the date when the Singer Company "Drove him out of *business.*" Cramer made a serious mistake in this assumption, and by the error and falsity of such assumption on his part completely barred any semblance or *scintilla* of evidence in this record to establish damages for any acts of the Singer Company in relation to his business. The recollection of Cramer as to the precise year or years when he sold these thirty-five or forty braces, between the years 1881 and 1885, may not be exactly accurate, but there is one thing that he does know, and must of necessity recollect, and which he swears to positively, and that is that he put in and sold this combination brace and treadle a *"little while after he had them cast,"* and that "it did not take him long to sell them; a little while after he had them cast," and further that he had memoranda and data to fix absolute dates of casting of the two sets of castings, namely, in the years 1881 and 1883.

The mechanism of the Diehl patent complained of as an infringement of Cramer's first claim, not in the California market until the year 1887.

Let us now see from the *testimony* if this *"business"* of manufacturing thirty-five or forty treadles in five years, as alleged by Cramer, has been interrupted or damaged in any way by any act of the Singer Company.

The full, complete and uncontradicted testimony in behalf of the Singer Company in this case shows clearly and conclusively that the Diehl stand and brace complained of were not sent to California by the Singer Company earlier than the month of April, 1886, and were not put upon the California market (and then only in a small number) until the year 1887, owing to the large stock of old stands, treadles and braces then on hand. This testimony is sworn to by the managers, officers and foremen of the Singer Company, and such testimony is backed up and made certain by references to contracts and printed matter, and is in entire harmony with the practice of the Singer Company of first installing in its eastern territory machines containing any alteration or change, so that if any defects are developed therein, the machines will be near its manufacturing plants, for alteration or correction.

Let us see what this testimony is:

John A. McMillan, of San Francisco, has been employed with the Singer Company in that city for nineteen years as shipping and receiving clerk, whose duties were to "take note of all the machines that went out, shipping them to various markets, . . . and setting up all machines in my department." (Rec. 290.) Mr. McMillan testifies that the Diehl brace first came to the

Singer Company at San Francisco in 1886 or 1887, and that he has examined the books and finds that the first consignment of Diehl braces to the Pacific Coast was in April, 1886. (Rec., p. 290.) A significant fact was also developed by this witness, that this Diehl brace was termed by the employees the *"stand of 1887,"* as shown by the following question and answer:

> "Q. Was there any other name given among the employees by which to indicate that brace from others?
>
> "A. *We called that stand the stand of 1887. That is the first stand of the kind that we got with the Diehl brace in it;* and that machine was called the Improved Family Machine." (Rec. 290.)

Mr. McMillan testified that he had made special search through the books and ascertained that April, 1886, was the date when the Diehl braces were first received at San Francisco. (Rec. 290.) McMillan did not know, however, how long after April, 1886, it was when the stands were sent out to the trade. (Rec. 290.) He did know, however, that there was a "big stock" of the old style of stands in the Singer Company's warehouse in San Francisco when the Diehl stands were first received in April, 1886, and he does know that the Diehl stands were not put upon the market and sold as soon as they got there (Rec. 308); and that the Diehl stands have never been sold in California except through the Singer Company's San Francisco house. (Rec. 308.) Mr. McMillan was subjected to a long cross-examination by Cramer's counsel, apparently to establish the fact that Improved Family Machines had been received prior to 1886 without the Diehl stand. This fact, however, had no relevancy in the case because the Improved Family Machine was sold with both the Diehl and trade-mark stands. McMillan, upon further examination, testified

that he had a distinct recollection of the reception of the Diehl stands in San Francisco in 1886; that the stands were new to him, and that he did not remember seeing them before, and that the reason they then had the consignment of the Diehl stands was on account of the low rate of freights, McMillan stating that—

> "We loaded ourselves up with stuff that year on account of freights being low, and there was a prospect of freights being raised, and that . . . we always work our old stock off before starting in with a new lot. It was the rule of the house and is yet. We keep it up all the time." (Rec. 313-4.)

Mr. McMillan testified positively that those Diehl stands received in April, 1886, were the first he ever knew of, and the first he had ever seen. (Rec. 314.) He testified further that none of the new Family Machines had in them the Diehl treadle. (Rec. 314-5.) There was introduced in connection with Mr. McMillan's testimony, and so testified to by him, a catalogue of the Singer Company, as applicable to its California business in sewing machines and illustrative and descriptive of the sewing machines then sold by the company in California. (Rec. 316-7.) This catalogue bears on its face, as will be seen, the fact that the general agency of the Singer Company for the Pacific Coast was at *"22 Post street, San Francisco."* The sewing machines then sold by the Singer Company on the Pacific Coast are clearly illustrated and described in this catalogue, *and no Diehl stand appears in such illustration or description.* As absolute confirmation of Mr. McMillan's testimony he states, and his statement is undisputed, that *the Singer Company did not move to 22 Post street, San Francisco, until July, 1885.* (Rec. 316.) Of course this catalogue was not printed until after the Singer Company moved to Post

street in July, 1885, and of course the absence from it of any Diehl stands shows that the Singer Company at that date was not selling them in California, Mr. McMillan testifying again positively that the Diehl stands were not in San Francisco prior to 1886 (Rec. 319); Mr. McMillan also testifying that the old books of the Singer Company, for the year 1884 and prior thereto, had been burned up (Rec. 315), and testifying also that it would be a mechanical impossibility to place the Diehl treadles in the several thousand old trade-mark stands they had on hand at San Francisco in April, 1886. (Rec. 323.)

Charles F. Krantz, a machinist residing in San Francisco, and who has been in the employment of the Singer Company from 1872 to the present time, testified that he represented the Singer Company, selling its sewing machines in Central America from 1882 to May, 1888. Mr. Krantz testified to the suggestive condition that he received all of his stock of Singer machines in Central America from the Singer Company's house in San Francisco; that he always demanded, and had the San Francisco house send him the latest styles of machines, and that up to the time he left the Singer Company's business in Central America in May, 1888, no Diehl stands had ever been received by him.

Henry F. Blanchett, a bookkeeper in the employ of Singer Company for twenty years (Rec. 324-5), testifies to the moving of the Singer Company to 22 Post street in July, 1885; that the circulars and catalogue of the Singer Company in evidence, pages 316-7, with the Singer Company's address, 22 Post street, thereon, were not printed before the company moved to Post street, and that there were no cuts of the Diehl stand in this circular, and that the circular was printed by the Singer Company in the East. (Rec. 325.) Mr. Blanchett testified that

the name given to this Diehl stand by the employees was the "stand of 1887." (Rec. 326.) Mr. Blanchett testified positvely upon cross-examination that the Singer Company had no Diehl stands on the Pacific Coast in 1885 (Rec. 327), and that no sewing machines were received with the Diehl stand until 1886. (Rec. 328.) He testified to the same recollection as to the reception of these Diehl stands in 1886, by reason of low freight rates, as Mr. McMillan (Rec. 328), and that his personal recollection is that the Diehl stands were not received at 22 Post street until eight or twelve months after they had moved there in 1885.

Donald Mackenzie, who has been in the employment of the Singer Company since 1881 in the East, testified that he never saw or knew of the Diehl stand in the East before 1885 or early in 1886. (Rec., p. 331.)

From this body of uncontradicted testimony by these several witnesses having absolute knowledge of the facts, the fact is as certain as any fact can be made certain by human testimony that no Singer machine containing the stand or mechanism that is proceeded against as an infringement in this case was ever sold to the trade in California until two years after Cramer says he had ceased all attempts, even, to sell any sewing machine with his combined brace and treadle therein. It is, of course, impossible that the sale by the Singer Company of the Diehl sewing machines in California could ruin the "business" of Cramer that had not existed for two years, and which, evidently and manifestly, had simply ruined itself. We respectfully submit that the alibi of the Singer Company as to this matter is proven beyond all reasonable doubt.

The testimony shows that not only was Cramer not damaged in any respect by the act of the Singer Company, but the testimony shows that the acts of the Singer Company were of great benefit and advantage to Cramer and his patent, if his device was of any value.

It is a curious fact that the testimony in this case, and all logical deductions therefrom, show conclusively that the acts of the Singer Company not only did not damage Cramer in any respect in his sewing-machine business, but as a matter of fact furnished a market for him and his alleged invention, and an opportunity for a vast utilization and employment of such alleged invention. The testimony in this case is uncontradicted that for a long period of years, and up to the year 1887, the Singer Company had sold in the California market, and in and around the territory, as to counties, where Mr. Cramer says that during that time he was selling sewing machines —simply thousands of machines with the treadle hung independently of the cross-brace. (Rec. 325-6.) The testimony also shows by the California agents of the other leading sewing-machine manufacturers of the United States that since the years 1882 and 1883 simply countless thousands of sewing machines have been sold in San Francisco and the Northern District of California with their treadles hung independently of the cross-brace, and have no connection therewith. (Rec. 292-302.)

A good illustration of this fact and its relation to the Cramer patent is found in the deposition of Mr. A. T. Eggleston. (Record., pp. 293 to 299.) Mr. Eggleston was the general manager at San Francisco of the Wilcox & Gibbs machine, a machine approximately as widely known as that of the Singer Company. He has been such

agent for thirty years. Mr. Eggleston testifies that the Wilcox & Gibbs machine has never had any vertical double brace of any description in it, and that the treadles have always been hung during that time upon the tie-rod or cross-bar. (Rec. 293.) Mr. Eggleston also testifies that the Wilcox & Gibbs machine has been sold in this market in competition with other machines constantly for thirty years past, and that it is a higher-priced machine than any of its competitors. Could any condition exist more favorable to an immediate adoption and widespread installation of Cramer's "*business*" than that furnished by the Wilcox & Gibbs machine, for in this machine there was actually no vertical double brace at all, and the treadle was hung on the tie-rod or cross-bar? Of course, if Cramer's treadle and cross-brace would add anything to the value of a machine, the Wilcox & Gibbs Company alone furnished an unfailing market for his "*business*" of manufacturing combined treadles and cross-braces, and putting them in machines that were so radically defective as not to have even any kind of a cross-brace.

Another forcible illustration of the folly of Cramer's contention of damage by the acts of the Singer Company is found in the testimony of Mr. C. A. Hawkins (Rec. p. 266), who is general agent of the White Sewing Machine Company at San Francisco. The White machine has been on the market since 1876 (Rec. 266-7), and has always had its treadle mounted on the tie-rod or cross-bar (Rec. 267), Mr. Hawkins testifying that it would be impossible to hang the treadle in the cross-brace of the White machine (Rec. 267); also that the sales of the White Company in sewing machines equaled those of the Singer Company on the Pacific Coast, and that their Pacific Coast sales "will run from 150 to 800 or 900 a month. I suppose 400 to 450 would be an average." (Rec. 274.)

Here, then, is a sewing machine of another manufacturer with the treadle hung independently of the cross-brace, and with the sale of machines in the same territory as the Singer Company on the Pacific Coast, 400 or 450 a month. Again we say what an opportunity and field is thus open and assured for Cramer's "*business.*" All he would have had to do to establish a trade as to the White machine alone would have been to have gone to each user, point out to that user the defects of the White treadle and brace and put his treadle and brace instead.

There can be no doubt that Cramer could as easily have put his treadle in all of the leading sewing machines sold in California in the last twenty years as in the American machine, as one of his leading witnesses so testified. Such witness was his daughter, Mrs. E. S. Abbott, and speaking upon this exact point, she said:

> "*My father put his patent treadle in some stands already in existence. He took the brace out of those stands and put the new brace and new treadle in. . . . He had all sorts of second-hand machines on hand. You could take the legs of almost any machine; it would not make any difference what sewing machines the legs belonged to, it did not affect the brace and treadle.*" (Rec., p. 157.)

Here, then, we say has existed a vast market for the last seventeen years for Mr. Cramer's alleged invention. It will be recollected that Cramer does not manufacture sewing machines, and never did, nor did he even manufacture the braces or treadles. All that he ever manufactured (not to exceed forty in number) has been a vertical double brace with the treadle hung in peculiar loop-holes in its lower depending ends, and capable of being substituted for the other vertical braces of all other sewing-machine manufacturers in this market. Here, then, we say, was a vast market furnished this plaintiff Cramer for a

period of seventeen years for his alleged invention. All that he would have to do to have made a fortune "beyond the dreams of avarice" would have been to have carried around by the wagon loads his vertical double-brace and treadle and substitute it in the machines of the other manufacturers for their double brace without such treadle connections. Even at a profit of a dollar a machine the aggregate sum received by Cramer, and with a suitable corps of assistants, would have been so vast as to preclude the possibility of its non-occurrence, if it were possible. We respectfully submit, therefore, that the conclusion is irresistible that this alleged invention of Cramer not only never added a dollar to the value of any machine in which it was placed, *but that as a matter of fact it was such a damage and detriment to any machine wherein it was placed that Cramer was never allowed to substitute his alleged invention in any machine owned by any third party, and not purchased by him and sold by him.*

The testimony is clear and uncontradicted to the end and effect that prior to the year 1887 every sewing machine sold by the leading companies and manufacturers of sewing machines in the Northern District of California, the Singer Company included, hung their treadles independently of the cross-brace of the sewing machine, and that if there was any necessity or demand for a sewing-machine treadle hung in the lower ends of a vertical cross-brace of a sewing machine, such necessity and demand was present in the thousands of sewing machines then in use in the Northern District of California. The testimony is also clear and uncontradicted, as above partially indicated, to the effect that since the year 1886, and down to the present time, all of the leading sewing-machine manufacturers of the United States sold their sewing machines by the thousands in the Northern District of Cali-

fornia, and all of such machines had their treadles hung independently of the vertical cross-brace. The plaintiff Cramer himself so testified, as follows:

"Q. Mr. Cramer, what sewing machines, if any, were in sale in Sonora, in competition with the Singer Company's machines, in 1885, and from that time forward until the present time?

"A. The American, the Wheeler & Wilson, the White—. . . .

"Q. Did any of those machines have the treadle hung in the cross brace, other than the Singer Company's machines?

"A. *The cross-brace containing my patent was only sold by me and the Singer Company, that I know of.* Does that answer your question?

"Q. In any of these other machines that you have mentioned, was the treadle hung in a vertical cross-brace, or not?

"A. No, sir. (Rec., p. 83.)

"Q. How many different manufacturers had machines on the market here in San Francisco for sale from 1885 up to the present time, in competition with the Singer Manufacturing Company?

"A. I don't know how many different kinds, but I could name you quite a number.

"Q. Please do so.

"A. The Domestic, the Wheeler & Wilson, the Howe, I think Crown was here, too, but I am not certain of that, and I think Standard was here, and the Florence I think has gone out of date. I don't know as they were manufactured and sold during those times — and the Wheeler & Wilson, and the White—I think the White had an office here. I am quite positive of all of those machines, if they were holding offices here at that time, and to the best of my knowledge they were.

"Q. In how many of those different machines, if any, was the treadle hung in the vertical cross-brace?

"A. In the vertical brace? Without going over how many I mentioned, the Domestic didn't have it

> hung that way, the White didn't have it hung that way, the Wheeler & Wilson didn't have it hung that way. The Howe didn't have it hung that way; the Florence, whatever there was of them, didn't have it hung that way. *It is the Diehl that had it hung that way.* (Rec., p. 84.)

It should be remembered in this particular connection that the Singer Company is not like Cramer alleges himself to be, manufacturing cross-braces with treadle connections to be utilized in all the different varieties of sewing machines. The Singer Company only manufactures a combined cross-brace and cross-bar with the treadle hung in the cross-bar, and not in the cross-brace, for its own machines, and not for any others. Of course the only effect that such manufacture could have upon the market, if the plaintiff Cramer's contention is correct, would be to make a demand for this same device in all of the other machines of the various manufacturers; and equally, of course, the Singer Company not being in a position to supply this demand, left the whole field open to Cramer to introduce his patent treadle in all of the other sewing machines.

We call the attention of the court, also, to the fact that since the year 1887 the acts of the Singer Company, as shown by the Diehl brace, have not damaged Cramer in any respect, because it is perfectly evident that any party desiring and intending to purchase a Singer machine would not have been diverted from that purpose by any kind of a brace appearing in any other kind of a sewing machine. There is not the slightest contention in this record that the Singer Company ever sold its sewing machines by reason of its brace. There is not the slightest proof in this record that any party ever intending to purchase an American sewing machine with Cramer's treadle and brace therein ever changed his mind and purchased a

Singer machine on account of the Diehl brace, or for any other reason whatever. *Indeed, if there was any advantage in the Singer sewing machine to the user by reason of the presence therein of the Diehl brace, such presence in the Singer machine of the Diehl brace, according to Cramer's theory, would have simply pointed out and illustrated practically to the users, the value of such a brace, and would have been the strongest argument that Cramer could have had to persuade the users of all other types of machines to permit him to take out the braces in those machines and substitute his combined brace and treadle therefor.*

We respectfully submit that in view of these facts upon this phase of the proposition alone, Cramer's contention that he has been injured in his "business" by any act of the Singer Company complained of is simply bald nonsense.

The testimony of Cramer shows conclusively that there was no connection whatever with the placing of the few treadles of his manufacture in sewing machines between the years 1881 and 1885 and the price at which he sold such machines, and from his own testimony it is made certain that the presence of the treadle had nothing to do with the price he received for the machines.

It needs but a cursory reading of the deposition of Cramer to show that the facts are simply these: That he was a dealer in new and second-hand sewing machines in a small way; that he purchased the new machines only of the American Sewing Machine Company, and that he bought the second-hand machines irrespective of their manufacture, and at whatever price he could purchase

them for, and as we shall see from his own quoted testimony, he put the device of his patent in these machines indiscriminately, new and second hand; *and it appears equally clear from his testimony that the widely varying prices at which he bought and sold these machines precluded the possibility of the presence of his device therein having anything to do with the price received.* Cramer's testimony upon this point is clear and emphatic, as follows:

> "Q. What did you pay for these American machines?
>
> "A. All the way, according to the amount I bought at one time, and the different styles of machines. I bought American machines—I also bought some second hand ones, for which I did not pay more than $5, and from $5 to $40.
>
> "Q. What would you sell a machine for that you paid $5 for?
>
> "A. The machine that I bought at $5 was a second hand machine. That I repainted and refitted it up, done perhaps $10 or $15 worth of work on it—I could not tell you exactly the amount, and I sold it for $45 or $50, just as I had the chance, and just as the customer happened to want it, on time or cash. The machines that I paid $40 for were new machines. I sold them for $90, and $95, and $100. I should say I don't remember now the exact price, but I think that is it, $95 or $100.
>
> "Q. I understood you to say that you sold those machines that you paid $40 for, for $90 or $95?
>
> "A. Yes, sir." (Rec., p. 193.)

The testimony shows, also, that Cramer put his thirty-five treadles largely in second-hand sewing machines, as follows:

> "A. I sold the American as a specialty, and *I traded in second-hand sewing machines;* most sewing machine men do that. *Those I fixed up and put on patent treadles and sold them*—I put on patent treadles on some of them. *In that way I sold most*

every kind of machine in the market, that is, in trading them and refitting them, *those that were good machines and worth being refitted, I fitted them up and sold them at some price."*

Let us see, now, whether we are correct in our statement that as a matter of fact the presence of Cramer's patented device in the few machines in which he put such devices had anything to do with the price at which he sold the machines. The first question and answer that throws any light upon this question is upon the direct examination of Mr. Cramer, where he was asked by Mr. Miller as follows (Rec., pp. 41-2):

"MR. MILLER: Q. Mr. Cramer, after you got up your invention, what did you do with regard to putting it into use and selling machines containing the same?

"A. I had them manufactured, put them into machines, and *I have sold the machines for five dollars more than I would,* an advance of five dollars on the patent treadle.

"Q. When did you first commence selling the machine with the invention in it?

"A. In 1881, the first one I had cast. That was cast, you know, at the foundry in say, January, 1881.

"Q. What foundry did you have the first one cast at?

"A. At Sonora.

"Q. In the foundry at Sonora?

"A. Yes, sir.

"Q. What did you do with that machine after you had it finished?

"A. I put the casting onto the machine shortly afterwards, or put it onto a second hand machine, and sold it for—*well, I sold that for a big price; I got $50 for it.*"

Also on page 44 the plaintiff Cramer was asked as follows:

"Now, Mr. Cramer, regarding the prices at which you sold your machines, did you get any addtional

price by reason of having your improvements on the machine, over the old machine?

"A. *I got $5 more; I charged $5 more.*" (Rec., p. 44.)

Objection was made to this testimony that was overruled by the court, and exceptions taken. (P. 44.)

Cramer testified further, as follows:

". . . *Some machines I sold at different prices from others I sold them all the way from $65 to $90, and several of them up to $100.*" (Rec., p. 44.)

"Q. What prices did you have to pay to the O. K. Foundry for casting those parts?

"A. They cost me a dollar and a half, all told; that is, the castings and the painting all together, cost me $1.50."

The Sonora brace cost him $5.50. (Rec., p. 82.)

Several facts appear to be made certain by this testimony, as follows: *First*, that Cramer bought his second-hand machines all the way from $5 to $40 and sold them for $45 to $50, just as he had the chance and the customer happened to want them, on time or cash; *second*, that he bought his new American machines for $40 and sold them for $90 to $100; *third*, that although he sold from ten to eighteen machines a month between the years 1881 and 1885, still he only put in thirty-five treadles and braces in such machines, second-hand and new; *fourth*, that even at this day, nearly twenty years afterwards, he would only swear as to the presence of his brace and treadle in those machines in the following indefinite language: "I have sold the machines for $5 more than I would. . . . I got $5 more; I charged $5 more." All testimony as to the price of machines, new and second-hand, with these thirty-five treadles and braces in them, and as to the sales of such machines, is confined entirely to the plaintiff Cramer, his son and daughter. As before stated, no witness

has been called, either purchaser or user, who ever purchased or used one of those machines who would swear that he even knew that such a brace and treadle was in the machine. No witness has been called, either purchaser or user, who would swear that he ever purchased or used either a new or second-hand machine with Cramer's patented brace and treadle in it of any description, and of course there is no testimony, outside of the Cramer family, that any purchaser or user ever paid a dollar more for a machine by reason of the presence of the patented treadle. The facts would seem to be, even as testified to by Cramer, that while he might have charged something more for a few second-hand machines in which he put his patented treadle, *the customer never knew of this fact*, and the wide range of prices at which he bought and sold machines, in which he says he put his thirty-five treadles, makes it simply impossible for him to testify with any truth or certainty that the presence of the treadle had anything to do with the price the purchaser paid for the machine. The facts probably are that he put this patented treadle, whatever the number was (he says thirty-five), only in second-hand machines that he sold there over a period of, he says five years; those which he bought at $5 and sold at $45, repainting and fixing them up; and that the purchaser of that kind of a machine did not either know, or care, what kind of a treadle there was in it.

We respectfully submit that all this testimony shows that if Cramer ever sold a sewing machine in which he put the combined brace and treadle, he sold it, *not because of the presence of the treadle in the machine, but in spite of this fact.*

Indisputably and admittedly, each of the thirty-five or forty machines sold by Cramer with his brace and treadle between the years 1881 and 1885 contained the devices of the second claim of his patent, and there is simply no testimony showing the value of the mechanism of this claim, or that any one of the thirty-five or forty sewing machines would have been sold without the presence of the devices of the second claim; all record evidence is clearly that Cramer's devices without this second claim are without value.

Cramer tries to get away from the abnormal and grotesque effect of his entire device as shown in detail in his second claim, by describing a somewhat different form of confining devices that he used in the thirty-five treadles and braces actually manufactured by him, to prevent the treadle from bouncing and thumping endwise when the treadle is in motion. In actual construction he testified that he prevented the bouncing and thumping of the trunnions endwise when the treadle was in motion by plugs of wood cut from a broom-stick (Rec., p. 105). The exhibit put in evidence by Cramer as to the braces that he actually had cast shows the lower end of the brace cast with an enlargement or bulb in which the hole was placed, carrying the ends of the trunnions, and this hole afterwards stopped by a cushioned plug of wood. The ends of these trunnions he says were also beveled on the top. This change, however, did not alter the fact that in all of those treadles appeared in substance the devices of the second claim of the patent, and for the precise purposes set forth in the patent.

We thus see, under the testimony that none of the

thirty-five machines sold by Cramer between the years 1881 and 1885, having the combined brace and treadle of his patent, were sold without substantially the special mechanisms, construction and arrangement of his second claim. So far as all testimony in this record shows, if any person purchased one of the thirty-five machines with Cramer's patent in it, the mechanism of the second claim was as essential as the mechanism of the first claim, in such machine. To be sure, Cramer attempts in his testimony to belittle and minimize in every way the invention of his patent, as shown by his second claim, but unquestionably it is out of Cramer's power twenty years after to contradict and negate the standing of that claim, and its effect and value upon any practical utility that may possibly exist in the peculiarly organized structure, as shown in his patent. It needs simply to look at figures 1 and 2 of his drawings, and especially figure 2, to show that if the block with its projecting tangs and its leather padding were removed from the Cramer device, there would remain a perfectly commercially worthless and inoperative structure having all the vices and defects which Cramer says even at this day his patent and invention was intended to remove. Cramer distinctly says through almost a fourth of his patent, in describing his structure, that the particular devices of the block and leather alliance of his second claim were there

> *" to cover the top and end of each trunnion, to serve as cushions to keep the same close in its bearings, to prevent the noise which would result were the trunnions permitted to bounce and thump endwise when the treadle is in motion. . . . The same leather also interposes between the end of the trunnion and the adjacent iron. . . . By this construction my treadle bearings are rigidly fixed and*

in no wise liable to get out of line or to require adjustment. The usual noise is prevented," etc.

Cramer states all of these facts affirmatively in his patent, and negatively to the effect that if the mechanical construction of the second claim was not present, his "trunnions would bounce and thump endwise; they would not be rigidly fixed, and they would get out of alignment and require adjustment, all accompanied with the usual noise." It is perfectly evident, simply from looking at figures 1 and 2 of Cramer's drawings, and especially figure 2, that if the block and leather padding and re-enforcing effect were removed, and the treadle put in motion, it would be unconfined in any direction; that it would simply bounce and thrash around in an unconfined opening; that the "end of the trunnion" would strike against the "adjacent iron." There would be nothing to prevent the trunnions and treadle from both lateral and vertical movement, and the only effect of the pear-shaped opening in which the trunnions are dropped, would be to cause the trunnions to slide down into the bottom of the opening when they are bounced out of place. The only condition that would govern the movements of the trunnions would be the length of throw of the pitman rod.

Joseph W. Lawler, one of the principal witnesses for the plaintiff Cramer, thus described the practical effect of an unsecured treadle as to the action of the pitman upon it:

> "Q. Do you believe that a treadle would be secured in a machine so as to make it a practical, good working machine if the treadle was left entirely free to jump just as high as the pitman rod was a mind to pull it?
>
> "A. I don't think it would. . . . O, no, not now-a-days. I would not think it was a practical treadle." (Rec., 188-9.)

Undoubtedly this witness told the truth as to this matter, and undoubtedly Cramer knew this to be the truth when he applied for and took out the patent in suit, and the existence of such fact as representing the truth, is the reason of the existence of his patent and of the peculiar and special devices exhibited in his patent to prevent these effects and results, and particularized in his second claim.

THE APPLIED LAW TO THE FACTS AS ABOVE ADMITTED OR PROVEN IN THIS RECORD—CLASSIFIED.

Point 1.

There being no proof of any kind or character in the record that the Singer Company has ever made any profit or profits by reason of its asserted employment of Cramer's patent, and the absence of such proof bars any consideration of the question of profit, or any argument or discussion upon this point.

We call the attention of the court to the fact that there is no proof whatever in this record that the Singer Company has ever made any profit by the use of the devices complained of as an infringement; and that there being no evidence in the case to justify a verdict upon the theory that the profits made by the Singer Company as to these devices are the measure of the damages, Cramer cannot invoke the rule of law laid down by Mr. Justice Strong in the case of *Mowry* v. *Whitney*, 14 Wall., 620, and reaffirmed in the *Root* v. *Railway* case, 105 U. S., 198, viz., that—

> "The profits which are recoverable against an infringer of a patent are in fact a compensation for the

injury the patentee has sustained from the invasion of his right. They are the measure of his damages. Though called profits, they are really damages, and unliquidated until the decree is made."

Even if the question of profits could enter into the question of the estimation of damages,

> "it is alone the profits that the infringer makes, or ought to make, which govern, and not the profits which plaintiff can show that he might have made." *Burdell* v. *Denig et al.*, 92 U. S., 720.

Point 2.

This being an action at law, the only question that can arise as to damages is the question of the actual damage that Cramer has suffered, and, in the absence of proof of actual damage, nominal damage only can be given.

In the case of *Philp* v. *Nock*, 17 Wall., 462, this court, passing upon this question, says:

> "*The plaintiff must show his damages by evidence. They must not be left to conjecture by the jury. They must be proved, and not guessed at.*"

In the case of *Blake* v. *Robertson*, 94 U. S., 733, this court says, speaking upon the proof—the kind and extent—that must be present to assess actual damages, as follows:

> "No license fee charged by the complainant is shown. The burden of proof rests upon him. *Damages must be proved; they are not to be presumed.* The complainant made a profit of forty dollars an inch on the width of the jaws of the numerous machines he had sold.
>
> "*But inventions covered by other patents were embraced in those machines. It was not shown how much of the profit was due to those other patents, nor how much of it was manufacturer's profit.* The com-

plainant was, therefore, entitled only to nominal damages. This the court gave him. It was all the state of the evidence warranted. It would have been error to give more."

In the case of *Rude* v. *Westcott*, 130 U. S., 152, this How., 488, this court said:

> "Where the plaintiff is allowed to recover *only actual damages, he is bound to furnish evidence by which the jury may assess them. . . . He cannot call on a jury to guess out his case without evidence. Such damages must be calculated, not imagined,* and an arithmetical calculation cannot be made without *certain* data on which to make it."

The emphasis and italicization of this word "certain" is in the decision itself.

In the case of *Seymour* v. *McCormick*, 16 How., 485, this court says:

> "Actual damages should be actually proved, and cannot be assumed as a legal inference from the facts which afford no data by which they can be calculated."

In the case of *Keystone Mfg. Co.* v. *Adams*, 151 U. S., 149, this court says:

> "But as we have seen, the burden of proof was upon the plaintiff. He relied, notwithstanding defendant's objections, on incompetent and irrelevant evidence, and the decree in his favor, in so far as it awards more than nominal damages, cannot be sustained."

In the case of *Coupe* v. *Royer*, 155 U. S., 583, this court says:

> "Upon this state of facts, the evidence disclosing the existence of no license fee, no impairment of the plaintiff's market, in short, no damages of any kind, we think the court should have instructed the jury, if they found for the plaintiffs at all, to find nominal damages only."

In the case of *Rude* v. *Westcott*, 130 U. S., 167, this court speaking upon the question of proof as to damages, and the opinions and conclusions of witnesses in establishing damages, thus states the law as to these conditions:

> "The estimates of all the witnesses of the complainant were merely conjectural; that is, were made without having knowledge of any saving secured, either in the cost of the machine or in the labor required for its use, they simply stating that they considered that the amounts named by them would be a reasonable and fair royalty or license fee for the patented drill . . . no evidence of the value of the invention to the defendants was adduced except the conjectural estimates stated; and they furnished no satisfactory basis for any damages, much less data, which authorized the specific finding made as to the damages for each drill used. *Opinions not founded on knowledge were of no value. Conclusions from such opinions were at best mere guesses. By the decision rendered a settled rule of law was violated, that actual, not speculative, damages must be shown, and by clear and definite proof, to warrant a recovery for the infringement of a patent.* As was said long ago by this court: '*Actual damages must be calculated, not imagined; and an arithmetical calculation cannot be made without certain data on which to make it.*' . . . *New York* v. *Ransom*, 23 How., 487, 488. . . .
>
> "*No legal ground being shown for the recovery of specific damages for the alleged infringement of the patents, the decree must be reversed, and the cause remanded, with directions to enter a decree for the complainants for nominal damages.*"

In the case of *Boesch* v. *Graff*, 133 U. S., 705, this court speaking upon this question of actual damages, and the relation of the proof to the particular patented feature and the defendants' machines, thus restates and emphasizes the rule of law:

> "Where the patentee granted no licenses, and had

no established license fee, but supplied the demand himself, and was able to do so, an enforced reduction of price is a proper item of damages, if proven by satisfactory evidence. *Yale Lock Mfg. Co.* v. *Sargent*, 117 U. S., 536. *The damages must be actual damages*, but where the patented feature is the essential element of the machine or article, as in the case just cited, if such damages can be ascertained they may be awarded. *When, however, a plaintiff seeks to recover because he has been compelled to lower his prices to compete with an infringing defendant, he must show that his reduction in prices was due* SOLELY *to the acts of the defendant, or to what extent it was due to such acts. Cornely* v. *Marckwald*, 131 U. S., 159. *There must be some data by which the actual damages may be calculated. New York* v. *Ransom*, 23 How., 487; *Rude* v. *Westcott*, 130 U. S., 152."

The language of the court as to certain evidence introduced in that case to establish damages is so curiously applicable to the facts in this case that we quote therefrom:

> " Conceding that as Graff granted no licenses, and had no established license fee, but supplied the demand for the burner himself and was able to supply that demand, and that, therefore, if he was compelled to lower the price by the infringement he would recover for the loss thus sustained, *does the evidence satisfactorily establish that the reduction in prices was due solely to the acts of the defendants in infringing? The opinion of Mr. and Mrs. Graff to that effect is not sufficient."*

Paraphrasing the language of this court, and applying it to the facts of this case, the opinion of Mr. Cramer and his son is not sufficient. Cramer never manufactured or put into a sewing machine his brace, to exceed forty in number, during the whole period of five years, ending in the year 1885 at the latest. The Singer Company never received a machine complained of in California before April, 1886, and never sold one until 1887. Of course

there was and could not have been any "actual damage" to Cramer.

From the authority of the above cases, only actual damages can be recovered, and in all instances the burden of the proof is upon the plaintiff to show by evidence what that damage is so plainly that it can be computed.

This is but another application of the well-known principle of law that the complaining party must establish the *right,* as well as the *extent,* of his recovery by evidence in the case; and that a failure in establishing the right of recovery defeats him entirely, and a failure to show by the evidence the *extent* of that *right* of recovery will give him the right to *nominal damages only.*

Philp v. *Nock,* 17 Wall., 460.
New York, etc., v. *Ransom,* 23, How., 487.
Blake v. *Robertson,* 4 Otto, 728.

Point 3.

The two claims of the Cramer patent in suit represent distinct and separate improvements and asserted inventions, and each claim must be taken and considered as if appearing and expressed in a separate patent.

There is no contention in this case, and no evidence to prove infringement of the second claim of the Cramer patent, and in fact Cramer's counsel disclaimed upon the record during the trial any assertion of infringement of this second claim. The case stands, therefore, in the same aspect as if Cramer's declaration or complaint was founded and brought upon two separate and distinct patents of

Cramer, each containing one claim only. Robinson on Patents, par. 985, thus lays down the law as to the separate claims of each patent standing for and representing separate inventions with the same force and effect as if embodied in a separate patent as follows:

> "A patent which embraces several claims, whether for the same or different inventions, stands in this respect on the same ground as if each claim were embraced in a separate patent; and every claim is therefore open to all those defenses which do not relate solely to the patent as a whole."

A recognition of the rule of law as laid down by this court in

Parks v. *Booth*, 102 U. S., 96.
Bates v. *Coe*, 98 U. S., 31.

The second claim of Cramer's patent was originally included in this suit, but upon the trial he elected not to proceed upon it, and it is difficult, indeed, to see how he can recover on a patent containing a claim upon which he had elected not to proceed, there being no proof as to damages except as to an opinion of Cramer as to the price he put on forty machines containing the alleged invention of *both* claims of his patent.

Point 4.

The actual damage, and the proof relating to such actual damage, must relate, and be confined, to the improvement identified by Cramer's first claim, whatever it is.

The alleged infringement in this case relates, and relates solely, to one isolated improvement identified by the first claim. Cramer himself as patentee has distinctly identified and classified his invention as to what it relates,

so that there can be no possible mistake as to this matter, Cramer stating in his patent that

> *" My invention relates to improvements in the bearings of sewing machine treadles . . and to this end my invention consists in the construction and combination of parts hereinafter fully described and claimed."*

This being so, what rule of damages shall be found and established to determine the actual damage that Cramer is entitled to recover from the Singer Company, if any?

The courts have been too explicit in all of their decisions upon this point to leave any room for question or doubt in this or any like case upon this subject. Say the courts:

> " Where an inventor has invented only an *improvement* and there is a violation of his right under his patent to use that *improvement* in connection with the inventions of others, or in connection with a machine previously known and used, *his damages must be limited to the value of his improvement* in connection with the several elements of the machine. *This is a subject in regard to which it may be difficult to give definite proof, but the difficulty does not change the legal principle."*
>
> *Seymour* v. *McCormick*, 16 How., 485.

In the case of *Burdell* v. *Denig*, 2 Fish., 595, Mr. Justice Swayne, delivering the opinion of the court, says:

> " Now, no testimony was given to show what proportion that mechanism bore to the other portions of the machine, and the jury were left to grope in the dark to reach such conclusions as they in the absence of the light of any other evidence upon the subject might be able to attain. We suppose that, in that state of the case, the plaintiffs were entitled, at most, to nominal damages only. *It was incumbent upon them to have given specific evidence to the jury, or at least that upon which the jury would have been*

warranted in forming a conclusion as to the extent and value of their claim."

In the case of *Buerk* v. *Imhaeuser,* 14 Blatch., 21, a case which after it went to the Supreme Court of the United States was there affirmed, 101 U. S., 647, the court said at the circuit:

> "In cases where the patent is for a *distinct improvement,* separable from the rest of the article as in the case put by the plaintiff's counsel, of a wagon with a patent pole, the rule is admitted and settled. . . . The same principle is, I think, applicable to a case of this kind. The watch is open to the manufacture of every one; and it is common to both the plaintiff's patented article and to the infringing article of the defendants. The wrong which the case shows the plaintiff to have sustained is the use of his invention in the making by the defendants of the infringing watches. . . . For this the plaintiff is entitled to recover in damages. But this rule has been disregarded. . . . *The burthen, in this respect, was upon the plaintiff".*

In the case of *Philp* v. *Nock,* 17 Wall.. 460, speaking upon this precise point, the Supreme Court says:

> "The measure of the damages to be recovered against infringers prescribed by the act of 1836 as well as by the act of 1870, is the 'actual damages sustained by the plaintiff.' . . . *Where the infringement is confined to a part of the thing sold, the recovery must be limited accordingly.* It cannot be as if the entire thing were covered by the patent; or, where that is the case, as if the infringement were as large as the monopoly. The plaintiff must show his damages by evidence. They must not be left to conjecture by the jury. They must be proved, and not guessed at."

In the case of *Black* v. *Thorne,* 111 U. S., 124, the Supreme Court of the United States, speaking of a case in parallel alignment with this, says:

"It does not always follow that because a party *may have made an improvement in a machine and obtained a patent for it*, another using the improvement and infringing upon the patentee's rights *will be mulcted in more than nominal damages for the infringement. If other methods in common use produce the same results, with equal facility and cost, the use of the patented invention cannot add to the gains of the infringer, or impair the just rewards of the inventor.*"

In the case of *The Goulds Manufacturing Company* v. *John P. Cowing*, 12 Blatch., 251, the court, Hunt, Justice, says:

"The question is, what advantage did the defendant derive from using the complainant's invention, over what he had in using other processes then open to the public, and adequate to enable him to obtain an equally beneficial result. The fruits of that advantage are his profits. They are all the profits he derived from the existence of the Whitney invention. The burden of proof rests upon the complainants. The damages to the plaintiffs, or the profits to the defendants (they are the same thing), must be proved like the other points in the case. . . . It is not necessary to further examine the cases upon this point. The Supreme Court have decided it explicitly, and, if there are cases found to the contrary, they must be considered as overruled."

In the case of *Mowry* v. *Whitney*, 14 Wall., 649, the court says:

"Now, it is clear that Whitney is not entitled to receive more than the profits actually made in consequence of the use of his process in the manufacture of the 19,819 wheels. It is the additional advantage the defendant derived from the process—advantage beyond what he had without it—for which he must account. . . .

"*The question to be determined in this case is, what advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public and ad-*

> *equate to enable him to obtain an equally beneficial result.* . . . The profits which are recoverable against an infringer of a patent are in fact a compensation for the injury the patentee has sustained from the invasion of his right. They are the measure of his damages. Though called profits, they are really damages, and unliquidated until the decree is made."

In the case of *McCreary* v. *Pennsylvania Canal Co.*, 141 U. S., 463, the court says:

> "There is no doubt of the general principle that, in estimating the profits the defendant has made by the use of the plaintiff's device, where such device *is a mere improvement* upon what was known before, and was open to the defendant to use, the plaintiff is limited to such profits as have arisen from the use of the improvement over what the defendant might have made by the use of that or other devices without such improvements."

In the case of *Garretson* v. *Clark*, 111 U. S., 121, the court, Mr. Justice Field, says:

> "When a patent is for an improvement, and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of the other parts, so that the benefits derived from it may be distinctly seen and appreciated. . . . The plaintiff complied with neither part of this rule. He produced no evidence to apportion the profits or damages between the improvement constituting the patented feature and the other features of the mop."

In this case the court adopts the language of Mr. Blatchford in the court below, reported in 15 Blatch., 70, as follows:

> "The patentee must in every case give evidence tending to separate or apportion the defendant's pro-

fits *and the patentee's damages between the patented features and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative."*

Point 5.

The value of Cramer's double brace device and treadle and the price asked by him for putting such double brace in a sewing machine in the years 1882-3-4 and 5, no measure of price or value of such device in the year 1895.

The testimony of Cramer shows, as we have seen, that he never sold or attempted to sell sewing machines with his treadle and brace therein after the year 1884-5. There is no proof in this record, as we have seen also, having any relation, even as claimed by him, to the value of his patented device, except as shown by his sales of thirty-five braces and treadles between the years 1881 and 1885. The assertion of damages as against the Singer Company is damages to Cramer, by acts committed by them in the years 1894 and 1895, or ten years after, admittedly, Cramer has never attempted to sell one of his patented devices. It would seem to be almost axiomatic that whatever value there was to Cramer's device in the years 1884 and 1885 was not the slightest guide or criterion to the value of such devices ten years later, or in the years 1894 and 1895. Even if this was a case to recover damages for an infringement of a patent under an established license fee, the most simple way of establishing damages where it is possible in any patent case, even in such a case, licenses ten years old would be of no value in establishing damages ten years later. In the case of *Adams* v. *The Bellaire Stamping Company*, 28 F. R., 360,

the late Justice Jackson, speaking upon this exact point, says, in instructing the jury in a patent case:

> "You as farmers or business men would not think of taking the price of a horse in 1866 and fixing that as the price in 1879. You would not be warranted in saying that in 1866 the price was the same as in 1879. . . . license fees for the use of that and another patent blended together would not establish a royalty as to either patent. . . . the burden is on the plaintiff to show you exactly what was paid as a royalty for that patent."

This case was afterwards affirmed by this court. 141 U. S., p. 542.

Point 6.

Rule of decision of this court as to the right and duty of a court to control the verdict of a jury and direct a proper finding upon the evidence submitted.

As we understand the decisions of this court, especially as applied to patent causes preliminary to the submission of any question of fact to the jury relating to letters patent of inventions, and questions of infringement, there is the question to be considered by the court as to whether or not there is sound and substantial evidence of asserted conditions and facts that should be submitted to the jury.

In the case of *Improvement Company* v. *Munson,* 14 Wall., 448, the court, speaking directly upon this point, says:

> "Nor are the judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of the proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was

> held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

In the case of *Bischoff* v. *Wethered*, 9 Wall., 814, relating to letters patent, the Court stated that

> "in such plain cases the court probably would feel authorized to set aside a verdict unsatisfactory to itself as against the weight of evidence. . . . The control which the courts can always exercise over unsatisfactory verdicts will enable them to prevent any wrong or injustice arising from the action of juries."

The rule is thus stated in the case of *Monclair* v. *Dana*, 107 U. S., 162-3, by Mr. Justice Harlan:

> "The rule frequently anounced that the jury may be controlled in their determination by a peremptory instruction if the testimony is of such a conclusive character as would compel the court, in the exercise of a sound legal discretion, to set aside a verdict if one were returned in opposition to such testimony. *Hendrick* v. *Lindsay*, 93 U. S., 143; *Phoenix Ins. Co.* v. *Doster*, 106 id., 36."

In the case of *Picasants* v. *Fant*, 22 Wall., 121, the court, speaking through Mr. Justice Miller (and speaking seemingly more freely for the rule than the language of the same great jurist in the case of *Tucker* v. *Spalding*, *supra*), says as follows:

> "It is the province of the court, either before or after the verdict to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor, not whether on all the evidence the preponderating weight is in his favor; that is the

business of the jury; but conceding to all the evidence offered, the greatest probative force which, according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it is not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is sufficient to warrant a verdict for the plaintiff, the court should say so to the jury."

The case in this Court of *Railway Co.* v. *Rowley*, 155 U. S., 621, contains a general recognition of the duty of the Federal Courts in patent causes to peremptorily instruct the jury, even upon the question of novelty, where, in the opinion of the court, patentable novelty is not exhibited, in that case the jury having found a verdict for the plaintiff for damages, and the trial judge refusing to instruct the jury that the patent was void for want of patentable novelty.

The verdict of the jury in this case was $12,456 and costs. There is simply in this record not the slightest evidence of any description upon which such a verdict should be calculated. The only manner of accounting for the verdict is found in the fact that the number of machines sold by the Singer Company in the Northern District of California, as shown by their books in this case, was 12,456 machines; and the presumption is conclusive that the jury simply attempted to equalize the distribution of personal property by their own sweet will, and giving Cramer one dollar a machine.

This case, by the amended complaint, only covered the Northern District of California (Rec., p. 2); and by the petition for the writ filed herein, Cramer had other suits pending upon this same patent against this same machine as an infringement against the Singer Company, aggregating in amount more than a million of dollars.

The case in this court of the Conqueror, 166 U. S., 134, is a case where the large sum of $15,000 as demurrage was found as damages, and so testified to by a number of witnesses; in justification of such amount, this court said:

> "The amount of demurrage allowed, too, was so great as, if not to shock the conscience, at least to induce the belief that it must have been estimated by witnesses who were most friendly to the owner. . . . is putting a strain upon our credulity which we find ourselves quite unable to bear. . . . Without imputing to the witnesses, who were sworn in this case upon the subject of damages, any design to mislead the court, we are bound to say that their testimony falls far short of establishing such a case of loss of profits as entitles the libellant to recover this large sum, etc."

Commissioners v. *Clark*, 94 U. S., 278.

Railroad Company v. *Converse*, 139 U. S., 469.

We respectfully submit, therefore, that in view of all of the above facts, that there was not only not sufficient evidence to support or justify the jury verdict in this case, but that there was no evidence, and no statement of any witness that arises to the dignity and character of evidence, that can be found in this record to support the jury finding; and that under the uniform later decisions of this court laying down the rule as to such conditions, therefore nominal damages only could have been found and the case must be remanded with instructions to set aside the verdict, and order the granting of a new trial.

The defense by the Singer Company of its agent, Willis B. Fry, in the case of the same plaintiff, Herman V. Cramer vs. Willis B. Fry, formerly pending in the United States Circuit Court for the Northern District of California, with the same patent in suit, and against the same precise structure, the Diehl brace and treadle, as proceeded against in this case; and defended by the Singer Company, to the knowledge of Cramer's attorneys; and judgment being found for the Singer Company's agent Fry, upon the ground of non-infringement—res adjudicata as to the Singer Company, and an entire defense in this case, and so pleaded in this record. (Rec., pp. 222-23).

There is a further vital and controlling question presented by this record, and involved in this case unusual and different from those questions present in almost every patent litigation, and that is, that Cramer has had his day in court against the Singer Company in an action defended by that company upon the same precise subject matter here involved; that the judgment in that action was against him, and in favor of the Singer Company upon the single ground of non-infringement; and that the question there litigated and decided is *res adjudicata* in this action. The judgment roll showing these facts is found in this record upon pages 347 to 358 inclusive; and the opinion of Judge McKenna identifying these facts appearing in 68 Fed. Rep., pages 201 to 212 inclusive.

In the first trial of this case before his Honor Judge Beatty, as above indicated, his Honor recognized and sustained this plea of *res adjudicata* and directed a verdict for the Singer Company; and, as before indicated, this

case went to the Court of Appeals of the Ninth Circuit, 93 Fed. Rep., 736, and was there decided solely and entirely upon the question of *res adjudicata,* that court holding in substance that so far as that record disclosed, the defense of the Singer Company by its agent was a secret defense, was conducted by Fry and his attorneys, and that no such asserted relation of the Singer Company to Fry, was shown to be known to Cramer.

The following single quotation, from the decision of the court shows the entire question considered and disposed of in that case:

> "On referring to the evidence in the present case, it will be seen that it falls short of showing that the Singer Manufacturing Company had such relation to the defense in the case of *Cramer* v. *Manufacturing Co.* that it can plead the judgment in that case in bar of this action. So far as the evidence discloses the facts, the company's connection with the former litigation was secret. The company was not present in court, nor was its participation in the defense open and apparent. The defense was conducted by Fry and his attorneys. That the company defrayed the expenses of the defense, and paid the defendant's attorneys, is not shown to have been known to the plaintiff."

The decision of the Court of Appeals, as above quoted, seems to have been taken to mean by the trial judge, that the knowledge of the defense by the Singer Company of its agent Fry in the court below *must have been known to the plaintiff Cramer personally, and that knowledge to his counsel of such fact was not knowledge to him.* In accordance with this view of the law, and apparently the understanding of the trial judge as to the decision of Appeal Court, all testimony offered by the plaintiff in error to show that this knowledge was possessed by Mr. Cramer's attorneys and was known to the attorneys of

Cramer during and prior to the trial of the case of Cramer against Fry—was ruled out as incompetent; the evidence offered by the Singer Company to establish these facts, the exceptions to the rulings of the court striking the same out—exceptions 6, 7, 8. (Rec. 334, 346-347.) This, we respectfully submit, was plain and manifest error, the rule of law being well established that knowledge of the plaintiff's attorneys in matters relevant to litigations of which he has charge is knowledge to the plaintiff himself. Indeed, how could the principle or rule be otherwise? There is no class of litigation with which a lawyer is entrusted, where a plaintiff knows less about the manner of the conduct of litigation, the reasons and rules which govern it and the facts which are necessary to bring about a desired result in favor of or against a patent or a litigant, than this same patent litigation. As to all of these matters a patentee, plaintiff or defendant, knows simply what his counsel, supposed to be skilled in patent law and patent litigation, tells him, if anything. The bringing and conduct of a suit upon a patent is the act of a patent lawyer, and usually his client, either as plaintiff or defendant, implicitly follows and is governed by the instructions and advice given him by his counsel. No better illustration of this well-known fact can be found than in the relation and acts of Cramer to his own counsel and the Singer Company in this litigation, and as to the precise point now under discussion, as testified to by Cramer himself, as follows (Record, p. 385):

> "Q. *How came you, then, to join the Singer Company with Mr. Fry when you brought that suit?*
>
> "A *You must ask the attorneys about that, how that happened. I don't know how—he was in their office in the former trial of Cramer and the Singer Company, they were joined together, and I presume that the attorneys thought that it would do that time,*

too. That is what I imagine. I don't know anything about it. But I heard the attorneys talk that time—that they would take the two in together."

Mr. Cramer having previously testified that neither during the trial of the former case, nor afterwards, did he know, or was informed, or had any notice that the Singer Company was defending its agent Fry. (Record, 383.) It is a curious fact, however, that this witness, as frequently happened in his testimony, forgot himself, and, as disclosed by his answer upon page 385, above quoted, that he, when he was off his guard, still considered his first case as a case against the Singer Company instead of Fry.

So complete and dense was the ignorance of Cramer as to all matters relating to the conduct of his suit against Fry, that although he had made oath to the declaration or complaint in that case, and had therein sworn positively that Fry was the agent of the Singer Company (Record, p. 347), still when he was examined in this case as to this same precise matter, he denied all knowledge at any time of the fact of such agency. The following questions and answers to the same by Cramer upon page 385 show this fact:

"Q. Do you mean to say that you did not know when you brought that suit *that Mr. Fry was the agent of the Singer Company?*

"A. *When it comes to right knowing, where could I know; where is my authority for knowing?*

"Q. The question is did you know or not?

"A. *I did not know it."*

Again, so entirely opaque was the ignorance of this plaintiff as to all matters relating to the bringing and conduct of his former case against the Singer Company and its agent Fry, that he did not know that his attorneys had waived all damages at the former trial of the

suit against Fry until the case was over, and does not even now know when the attorneys did it, Cramer's exact language being: "But why the attorneys made that change I cannot tell, nor did I know it until the suit was over. I cannot tell you why the attorneys did that." (Record, p. 387.) We believe it is not customary for the defendant in any patent litigation, or the counsel for the defendant, to hold any communication with the plaintiff in such litigation. We know of no reason and can conceive of no occasion for so doing; all matters of every kind, name, nature and description relating to such litigation being conducted by the respective counsel for both parties litigant. We can conceive of no more flagrant and inexcusable breach of those well-settled rules of conduct in the control of patent litigations than for the counsel upon either side to communicate or attempt to communicate directly with the clients of the opposite party or give him notice of any matters whatever. If, therefore, Mr. Cramer's counsel knew, or had good reason to know, that the Singer Company was back of, and in fact was all there was to the defense in the case of Singer Company against Fry, such knowledge by Cramer's counsel was the knowledge of Cramer himself, and he was bound thereby. This was what he had "*heard the attorneys talk that time.*"

Antecedent and contemporaneous facts attending the preparation and trial of the Cramer-Fry case, prove conclusively and unerringly that Cramer's attorneys and counsel knew that the Singer Company was back of that litigation and represented all defenses therein.

We beg leave to call the attention of the court to the facts as disclosed by this record that, although Mr. Cra-

mer himself was prompt and swift to deny all personal knowledge of the fact being known to him that the Singer Company was back of the litigation against Fry, and indeed has denied personal knowledge to a great extent of the conduct by his attorneys of that case in his own interests, the curious and suggestive fact is apparent in this record that *none of Mr. Cramer's several attorneys and counsel attending and conducting the trial of his case against Fry have testified or indicated in any way that they, and each of them, did not have full knowledge that the Singer Company was back of that litigation and represented all the defenses.* If Cramer's attorneys, or any one of them, did not know that the Singer Company was back of the Cramer-Fry case, why did not they, or some one of them, simply appear upon the stand in this case and say so? The conclusion is obvious and irresistible that their failure to so testify is the best proof of their knowledge. Every act and movement of Cramer's several attorneys, from the filing of the declaration originally against the Singer Company and its agent Fry, to the entry of the verdict for the defendant Fry in that case, points as conclusively to the knowledge of the attorneys of the fact of the defense of that case against Fry as if their sworn testimony was here present to confirm such fact. Cramer's attorneys knew, as shown by the declaration as drawn by them, that Fry was a mere agent of the Singer Company, and of course upon a salary. They knew that Fry had personally not the slightest interest in the defense of that suit, except the interest that every employe has in subserving and advancing the business of his employer, and no salaried employee has ever been known to pay money out of his own pocket in so doing in a patent case. The attorneys for Cramer knew, and must have known, that no judgment or verdict for dam-

ages could be obtained against Fry as the selling agent of the Singer Company, and that no case can be found in the books where any such judgment has ever been rendered against an agent or employe of an infringer of a patent, and the fact that in the opening of the case before the jury, all question of damage against Fry was waived by Cramer's attorneys shows that they knew this.

Cramer's counsel knew, and must have known, that the several patent counsel, both east and west, who appeared and put in the defenses in the Cramer-Fry litigation, were not, and could not be, the personal counsel of Fry. Cramer's counsel must have known that the taking of the testimony in the east and the examination of one of the leading expert witnesses in patent causes in this country, Mr. Brevoort (Record, p. 218), and the introduction of the models and exhibits in connection with these depositions, was not and could not be the act of a salaried employe and agent, and must and could have been only the act of the Singer Company, it appearing by the deposition of Mr. Brevoort himself that he had been employed by the Singer Company. (Record, p. 218.)

Cramer's counsel knew, and must have known, that no responsible manufacturer ever abandons a salaried agent and employe sued for an infringement of a patent, where such act of infringement consists solely in the sale of the product of the manufacturer, and must have known that the Singer Company, with agencies in all parts of the United States, and its fifty years' reputation for high standing and character in all that relates to a manufacturer or its output, would have been the last party in the world who would so abandon an agent or employe. Cramer's attorneys, thus knowing that the Singer Company was back of its agent Fry in this litigation, must have continued such suit and gone through

the long trial that occurred thereafter for the sole purpose of asserting any favorable judgment rendered against the Singer Company upon the ground that that company was bound by the judgment because it was back of the defense; such judgment, if favorable to Cramer in that litigation, of necessity representing a finding that the Cramer patent was valid, and the machine of the Singer Company proceeded against an infringement thereof. The patentee, plaintiff and witness Cramer, all combined, unwittingly and accidentally, it must be believed, so far as he is concerned, confirmed and announced this fact in his testimony (Record, p. 386), where he says:

> "While I was prosecuting my suit against Fry *I was prosecuting him because of his selling Singer sewing machines alone.* I was aiming at Mr. Fry right there and then and nobody else. The Singer Company ruled themselves out. *When I got through with Mr. Fry I would go to New Jersey and sue the Singer Company,* and I would have done so had not a law been passed in 1897, which gave me the right to sue the Singer Company here again."

Of course the reason that he was going to New Jersey to sue the Singer Company "after I got through with Mr. Fry," was because he expected to contend that the judgment against Fry as an agent was *res adjudicata* against the Singer Company in a suit defended by them. Cramer's counsel undoubtedly knew also that for years the patent counsel, both East and West, representing Mr. Fry, agent of the Singer Company, were the counsel of the Singer Company, and had through a series of years defended that company constantly in the courts, both at the Circuit and in this court, in patent causes, as represented by the case of Brill against the Singer Company.

The dismissal of the suit of Cramer against The Singer Company and its agent Fry—as The Singer Company, "without prejudice"—a persuasive piece of evidence to the effect that Cramer's attorneys well knew that The Singer Company was all there was to the defense, and that they prosecuted the suit against Fry solely for that reason.

The fact that the suit against the Singer Company was dismissed "without prejudice" is an entire confirmation of the position that Cramer's attorney's prosecuted the suit against Fry solely because they knew the Singer Company was back of it, and that the suit was dismissed against the Singer Company "without prejudice" solely because they expected to enforce the doctrine of *res adjudicata* against that company, if successful, and if the suit had not been dismissed "without prejudice" they could not have attacked the Singer Company by reason of the absence of such condition in the dismissal. If the Singer Company had not been back of, and responsible for, the defense of its agent Fry, no judgment rendered against Fry could in any way have been binding upon that company, nor could that company in any way have been affected thereby; and it would have been perfectly useless for Cramer and his attorneys to have carried out the program admitted to have been formed, even to the plaintiff Cramer's knowledge, and expressed in his statement that *"when I got through with Mr. Fry I would go to New Jersey and sue the Singer Company."* Certain it is that this prosecuting of the suit against Fry would have been without any profit or advantage in the New Jersey Circuit if it had not been admitted, or made to appear, that the Singer Company was defending that litigation; and certain it is, also, that even so far as this rec-

ord shows, the facts of the defense of its agent Fry by the Singer Company were an open book to court, counsel and jury during the trial of the Cramer-Fry case, as shown in every line, movement and action of counsel for both parties during the preparation and trial of this case.

The trial court seems to have drawn an inference from the fact that the case had been dismissed "without prejudice," that this dismissal was an indication that the Singer Company was not back of the fight, and would not be bound by the defense. We respectfully submit that no such inference could, or ought, to be drawn. By the federal enactment, as then existing, the suit against the Singer Company was wrongfully brought; as the law then stood a corporation must be sued in the district whereof it was an inhabitant; and it was simply necessary to call the attention of the court, on the face of the pleadings, to the fact that this law had been violated, to secure the dismissal of the suit. As before stated, the dismissal of the suit did not change in the least the interests of the Singer Company in the result of the suit as to its agent. Under every principle of commercial honor and decency, it was bound to defend, and see through, its agent in a patent suit brought about solely by the act of such salaried agent or employe, in selling its machines. If, also, judgment was to be rendered for damages against its agent, the Singer Company would of course have to pay it, and would be interested in seeing that the amount of such damages was as small as possible. This being an action at law, it could well be, also, that the Singer Company was entirely willing to abide by the construction of the trial court to be given to the Cramer patent, with full confidence in any such submission as to the impossibility of its sewing machines being brought under any construction by the court given to the Cramer patent

as an infringement. Moreover, above and beyond all this, it is perfectly apparent that the Singer Company in the old Cramer-Fry litigation, while it might have been perfectly willing to abide by the decision of the trial court as to the construction of the patent and abide by the finding of the jury as to the question of infringement, still, the Singer Company would not for one instant propose to submit itself to the mercy of a jury of citizens of California, to determine any question relating to its manufacture of sewing machines, and the sum of money they should contribute to a patentee therefor; and we respectfully submit that the reckless action of the jury in this case (characterized by no stronger terms)—the total impossibility of even guessing as to any measure of asserted damages sustained—the certain proof in this record that as a matter of fact no damage was ever sustained by the plaintiff Cramer by any act of the Singer Company, and the further fact that if this jury verdict remains undisturbed, the property of the Singer Company will be subjected to spoliation to the extent of over two millions of dollars, governed only by the guessing capacity of respective juries in all parts of the country—are all ample reason for the willingness of the Singer Company to defend its agent as to any suit brought against him alone, and certainly ample reason and explanation of the refusal of the Singer Company to allow a suit brought unlawfully against it to stand—and to compel the plaintiff to begin suit in the district whereof the Singer Company was an inhabitant, to determine all these questions, and as the only rightful jurisdiction where such suit could then be brought.

No conflict of testimony in this record and case as to the fact that The Singer Company was back of the defense of its agent Fry, furnished all the counsel, and paid every dollar of the expense of every kind, name, nature and description of such defense.

The testimony is full, complete and uncontroverted that the Singer Company was practically the defendant in the case of the plaintiff Cramer against its agent Fry, and that the presence of Mr. Fry's name as a defendant in that litigation was a mere incident in its conduct.

Mr. F. J. Kierce, one of the attorneys for the Singer Company at the time of the suit of Cramer against Fry, testifies, itemized and in detail, as to this matter; his exact testimony being as follows (Record, p. 337, Vol. II):

> "A. The Singer Company paid all the fees in all the litigation of this case of *Cramer* v. *Fry*. All the charges for attorney's fees, costs, and everything, connected with this case, were made against the Singer Manufacturing Company and the Singer Manufacturing Company only. I know that of my own knowledge, because I presented the bills, I made the collections, and the blotter of the office of Wheaton, Kalloch & Kierce will show that the charges are made by me in the books.
>
> "Q. That applies to all the attorneys' fees in California, does it not?
>
> "A. All the fees that were paid out here.
>
> "Q. Do you know at whose expense the depositions were taken in the East?
>
> "A. They were paid for there. The only information that I have in connection with that is this: After the jury rendered its verdict in the case of *Cramer* v. *Fry*, I telegraphed to the East to get the items of cost from the commissioners who took the testimony. Telegrams were sent back in reply, and the costs were inserted in the cost bill, now on file.

They never were paid here, nor any charges entered in our books for them here, except in so far as the charges were entered for affidavits which were made in this city and county.

"Q. Did Mr. Fry ever pay a dollar of the expenses of that litigation, the case of *Cramer* v. *Fry?*

"A. Not one cent."

Mr. Fry, the agent of the Singer Company, and the nominal defendant in the former Cramer-Fry case, testified in this case as to the entire defense in that case by the Singer Company, as follows (Record, pp. 340-41):

"Q. Mr. Fry, as a matter of fact, who did make the defense in that case?

"A. The Singer Manufacturing Company paid all the expense of that litigation. You are referring now to the Cramer-Fry case?

"Q. Yes.

"A. They paid it; yes, sir.

"Q. Did you pay any of the expenses of that litigation yourself?

"A. No, sir.

"Q. What attorneys were employed in defending the suit here?

"A. Messrs. Wheaton, Kalloch & Kierce. The suit was originally brought against the Singer Manufacturing Company and myself.

"Q. What attorneys were employed by the Singer Manufacturing Company to defend the suit as to themselves?

"A. Messrs. Wheaton, Kalloch & Kierce here, and Mr. C. K. Offield in the east.

"Q. Was there any change made in the attorneys when the suit was dismissed as against the Singer Manufacturing Company?

"A. No, sir. The same attorneys were kept right along through the case.

"Q. Who employed Mr. C. K. Offield in the east?

"A. He was employed by the Singer Manufacturing Company. I wrote them when the case was dismissed as against themselves, or at the time, that

we should rely on their furnishing information both as to the facts and the law regarding it, and Mr. Offield was sent here by them and also took depositions in the east which were used in the case, and those were furnished by the company in the case against myself."

This testimony is not disputed or questioned by any witness, and stands unchallenged as representing the facts in this case as to this matter.

The rejected testimony showing, and tending to show, that the attorneys of Cramer knew that The Singer Company was back of its agent Fry in the litigation of Cramer against Fry, and were alone defending that suit, and that such suit was in intent and reality a suit against The Singer Company.

It is without dispute and contention in this record that Mr. Boone and Mr. Nouges were two of the principal attorneys for the plaintiff Cramer in the trial of the case of Cramer against Fry, as disclosed by the pleadings, and conducted the trial of that case. In addition to this fact being apparent from the record, and undisputed, it is so testified to by the witness Kierce. (Record, p. 336.) It would seem then, that any statement made by either of such attorneys as to their knowledge relating to the defense by the Singer Company of their agent Fry, and any action done by them to show and establish such knowledge, would be competent evidence in this case; such evidence, however, when offered, in every instance, being excepted to by Mr. Cramer's counsel and stricken out by the trial judge upon motion then made, and in each instance so excepted to by counsel for the Singer Company. During the progress of the trial of the case of Cramer

against Fry, and after the waiver by Cramer's counsel of all claims for damages in such case, Mr. Kierce had an interview and conversation with Mr. Boone at his office in this city that related to and covered the precise point in issue. (Record, p. 334.) The testimony of Mr. Kierce, and the action of the court thereon as to this matter, is as follows:

> "A. Mr. Boone said that in the case of *Cramer* v. *Fry*, he did not expect to make anything out of the defendant Fry, for the reason that he was the Singer Company's agent, but that he expected to recover a judgment in that action, that is, in the case of *Cramer* v. *Fry*, before the jury, and that he would make that judgment the basis of proceedings for the purpose of getting an injunction against the Singer Company. *At the same time and place he said that we ought to be well paid by the Singer Company for the services which we were rendering in that action in defending it.* Mr. Cramer was present at that conversation, it was said in his presence, and at the same time he suggested that we ought to be well paid for the services rendered in that case by the Singer Company. He did not participate in the other portion of the conversation to which I have just testified, except in so far as he heard it.
>
> "MR. MILLER: I move to strike out that answer upon the ground that it is wholly incompetent, irrelevant and immaterial.
>
> "THE COURT: The motion to strike out is granted.
>
> "MR. WHEATON: We will reserve an exception.
>
> "Exception sixth.
>
> "To which ruling of the court the defendant, by its counsel, duly excepted, and hereby tenders this, its bill of exceptions for the court to sign and seal, and the court does hereby sign and seal the same.
>
> "MR. OFFIELD: Does your Honor strike out the part of the conversation alleged to have occurred that related to the Singer Company paying for the defense of the suit?
>
> "THE COURT: Yes. That was the conversation

of Mr. Boone. Mr. Boone said he hoped the Singer Company would pay them well."

The court, however, thereafter seemingly modifying its ruling only as to that portion of the answer of Mr. Kierce that related to the personal statement of Cramer. (Record, p. 335.)

It is contended in behalf of the Singer Company *that the case of Cramer against Fry was conducted exactly and precisely as if it was a case against the Singer Company alone; that it was so considered by the court and all counsel for attending parties present at the trial,* and that the testimony offered by the plaintiff in the case of Cramer against Fry was admitted by the court upon the theory and assumption alone that the case was in reality against the Singer Company, and that such testimony had no possible relevancy whatever if it had been, as now asserted, simply a case against Fry. If these contentions are correct, and the record in the case of Cramer against Fry should so disclose, there could be no more positive proof and determiation of the fact that the Singer Company *per se* and alone was defending that case. Yet the trial judge in the present case excluded all such testimony offered from the old record to establish this fact, under protest and objection made (Record, pp. 344-45-46) as follows:

"MR. KALLOCH: We also offer, from the same transcript, page 29 thereof, a letter, date Sonora, California, February 8, 1883, addressed to the Singer Manufacturing Company, by Mr. Cramer. That letter was marked in this case as 'Plaintiff's Exhibit H.' It is as follows:

" 'SONORA, CAL., February 8, 1883.

" 'THE SINGER MANUFACTURING COMPANY.

" '*Dear Sirs:* Having invented one of the most improved sewing machine treadles, I desire to call your attention to its merits, to make your machine

the most complete of any sewing machine in the market. I think you should embody my improvement in your machine. My patent treadle consists of a brace and treadle working in combination with each other, is frictionless as can be, noiseless, self-adjusting, always in line, most cheap, never needs adjusting, does away with cones and set-screws, and makes the machine run a great deal lighter. I desire to sell my patent right, reserving the right to put them on all machines I sell, or to have you put them on your machines and give me a royalty.

" 'Yours truly,

" 'HERMAN CRAMER,

" 'Sonora, Toulumne Co., Cal.'

"The record then proceeds: 'Marked Plaintiff's Exhibit C.' This is the reply: 'Office of the Singer Manufacturing Company, 34 Union Square, New York, February 20, 1883. Mr. Herman Cramer, Dear Sir: (Reads letter). (Marked Plaintiff's Exhibit 'D.')

"MR. MILLER: We object to that offer on the same ground.

"THE COURT: What is the relevancy of that? That is in evidence already in this case.

"MR. KALLOCH: The purpose is to show that the correspondence between Mr. Cramer and the Singer Manufacturing Company, which is pertinent in this case, was introduced with equal claim of pertinency in the case of *Cramer* v. *Fry*, and could have had no other bearing in that case than to fasten the infringement upon the Singer Company instead of Mr. Fry. It has no reference to the issue between Mr. Cramer and Mr. Fry.

"THE COURT: Would it be relevant to the issues that arose on the complaint and answer between the plaintiff, and Fry as agent?

"MR. KALLOCH: No, your Honor, because at the time, the recovery for damages for infringement was limited to two years prior to the commencement of the action, and that was dated many years before that. It would have no reference to the issues between Cramer and Fry, certainly if to the issues between any of the parties. It was after damages had

been waived, also, in the opening address by Mr. Boone.

"THE COURT: I would like to hold that matter in reserve. I have very serious doubts about the competency or relevancy of it. The whole proposition, as far as I can see at this moment, is presented by Mr. Boone's statement.

"MR. KALLOCH: Very well, your Honor. We will pass that and I will make another offer from the record from page 115. This is a question by counsel for the plaintiff.

"Q. What is this pamphlet I hand you?

"A. That is a Singer Manufacturing Company's directions for one of their styles of machines.

"Q. Do you sell that style of machine?

"A. We do sell very few of these.

"Q. You have sold some?

"A. There have been some sold; quite a number sold.

"Q. I refer to the machine represented on page 24 of that catalogue. State whether or not you have sold any machines of that kind, constructed in that way.

"A. Our office has handled and sold machines with that form of brace and treadle in.

"MR. BOONE: We offer this catalogue, the page particularly, in evidence.

"Q. I now hand you a copy of a patent issued to P. Diehl on the 14th day of October, 1884.

"THE COURT: Is there any objection to that page?

"MR. NOUGUES: Page 24, figure 26.

"MR. WHEATON: Yes, sir.

"THE COURT: What is the objection?

"MR. OFFIELD: It is only a part of a machine, and it does not show when it was done.

"MR. BOONE: I propose to follow it up.

"MR. WHEATON: They are offering the patent, which is much more correct.

"THE COURT: Do you withdraw this page?

"MR. NOUGUES: No, sir.

"THE COURT: The objection is overruled.

"MR. KIERCE: We except.

"MR. BOONE: I will read this.

"THE COURT: I was only admitting the diagram.

"MR. BOONE: We offer the whole paper.

"THE COURT: What is the objection of the reading matter?

"MR. NOUGUES: *It is descriptive of the machine they are selling, and which it is claimed is an infringement of this machine, and it sets forth the advantages that the company is claiming for that particular form of treadle.*

"MR. MILLER: We object to that upon the same grounds, if your Honor please.

"THE COURT: I will sustain the objection to that. You see, Mr. Kalloch, that is descriptive or is relative to the mechanism and as to whether or not it is an infringement.

"MR. KALLOCH: There is only one other point, and that I do not think will be denied, and that is that the machine alleged to be the infringing machine in that case is the same one that is alleged to be the infringing machine here. The infringing device in that case certainly was the Diehl stand, as we have it in this case.

"THE COURT: Is not that the infringing device in this case?

"MR. MILLER: Yes, your Honor, but I do not see how that cuts any figure in the present discussion.

"THE COURT: I will sustain the objection.

"Exception seventh.

"To which ruling of the Court the defendant, by its counsel, duly excepted, and hereby tenders this, its bill of exceptions, for the Court to sign and seal, and the Court does hereby sign and seal the same.

"MR. KALLOCH: What is your Honor's ruling as to the letters which were read?

"THE COURT: I will sustain the objection to them.

"Exception eighth.

"To which ruling of the Court the defendant, by its counsel, duly excepted, and hereby tenders this, its bill of exceptions, for the Court to sign and seal, and the Court does hereby sign and seal the same."

The trial judge, in his charge to the jury upon this precise point, charged that the defense of Fry by the Singer Company must not only be an open defense, but *must be "known to the plaintiff Cramer at the time of the trial of said case."* (Rec., p. 420.)

The rule of law, in effect, that an attorney has the exclusive authority in the general management of a suit and the free and full control of the case, and is under no obligations to consult his client, his acts and knowledge being of binding effect as to his client and the adverse party.

The relations that exist between attorney and client are the relations of principal and agent, and are governed by the same rules of law as the law of principal and agent, with the exception that in view of the subject-matter out of which such relation of attorney and client usually arises, a wider and more comprehensive scope and effect is given the relation of attorney and client than to the ordinary relations between principal and agent. Weeks on Attorneys at Law, Second Edition, page 441, par. 216, thus states the proposition:

> "The law of principal and agent is generally applicable to the relation of attorney and client. The client is bound according to the ordinary rules of agency by the acts of his attorney within the scope of the latter's authority."

Citing among other authorities:

Wharton on Agency, Sec. 580.
Russell v. *Lane*, 1 Barb., 519.
Sampson v. *Ohleyer*, 22 Cal., 200.
Fairbanks v. *Stanley*, 16 Me., 296.
Ware v. *Baird*, 12 Ind., 318.

In the case of *Nightingale* v. *Oregon Cent. Ry. Co., et al.*, 2 Saw., 338, the court, Judge Deady, passing upon the authority, of record counsel, in a case in the federal court, states as follows:

> "Sec. 35 of the Judiciary Act (1 Stat. 92) provides that in all the courts of the United States the parties may plead and manage their own cases personally, or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct cases thereof. When in this court a party does not choose to manage his case personally, as permitted by this Section, he can only do so by an attorney thereof. He cannot appoint an agent not an attorney of this court and authorize such agent to represent him in the suit, but when a party makes his choice and selects an attorney of this court to conduct and manage his case, *the attorney stands in his place. Until such attorney is changed or discharged he has the exclusive control of the conduct and management of the suit.*"

There is a long line of authorities upon the proposition that an attorney has the full and free control of his client's case in all matters involving the ordinary conduct of the suit, and that he is under no obligations to consult his client.

Wharton on Agency, Sec. 585.
Commissioners v. *Younger*, 29 Cal., 147.
Pierce v. *Strickland*, 2 Story, 292.
Clark v. *Randall*, 9 Wis., 135.

As corollary to this proposition, and illustrative of its force and extent, is the rule of law that a client being bound by the acts of his attorney without collusion with an opposing party, he can have redress against his attorney in case of injury from these acts committed through gross ignorance or negligence.

Sampson v. *Obleyer*, 22 Cal., 200.

Foster v. *Wiley*, 27 Mich., 244.
Chambers v. *Hodges*, 23 Tex., 104.

Notice to the agent is notice to the principal; notice to the attorney is notice to the client, and this notice may be either actual or constructive.

The rule of law is also well established, we take it, both in the federal and state courts, to the effect that notice and knowledge to an agent is notice and knowledge to the principal. Mecham on Agency thus lays down the proposition, p. 547, Sec. 718:

> "It is a general rule settled by an unbroken current of authority that notice to an agent, while acting within the scope of his authority, and in reference to a matter over which his authority extends, is notice to the principal. . . . That the notice or knowledge which should be imputed to the principal is that only which relates to the subject-matter of that agent's authority, or, in other words, is that only which relates to the business or transaction in reference to which the agent is authorized to act by and for the principal."

The Supreme Court of the United States, in the "Distilled Spirits" case, 11 Wall., 367, speaking through Mr. Justice Bradley, thus clearly and concisely states this rule of law and the reason therefor:

> "The general rule that a principal is bound by the knowledge of his agent is based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiations, and the presumption that he will perform that duty."

Immaterial whether the notice or knowledge of the agent relating to the subject-matter of the agency is acquired during or before the agency.

There are certain exceptions to the above proposition to the effect that professional secrets relating to the subject-matter of the agency are not to be disclosed, nor used either for or against a principal by the agent, and to the further qualification that if the knowledge existed so long ago as to be naturally forgotten, the principal shall not be bound thereby, neither of which conditions apply to this case. Mechem on Agency, page 550, paragraph 721, thus states the rule under this aspect:

> "The law imputes to the principal and charges him with all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority, *or which he may previously have acquired and which he then had in mind or which he had acquired so recently as to reasonably warrant the assumption that he still retained it.*"

In the case of *Lebanon Savings Bank* v. *Hollenbeck*, 29 Minn., 322, speaking upon this point, the court says:

> "Knowledge of an agent acquired previous to the agency, but appearing to be actually present in his mind during the agency, and while acting for his principal in the particular transaction or matter, will as respects such transaction or matter be deemed notice to his principal and will bind him as fully as if originally acquired by him."

Again, in the case of *Choteau* v. *Allen*, 70 Mo., 290, the court says:

> "Knowledge acquired not only during the continuance of the agency, but also that possessed by the agency so shortly before as necessarily to give rise to the inference that it will remain fixed in his

> memory when the employment begins, binds the principal."

The case of the "Distilled Spirits," 11 Wall., 367, *supra,* also clearly states this rule of law as here asserted; exceptions thereto, and the reasons therefor:

> "This rule does not depend in either case upon the fact that the agent *has* disclosed the knowledge or information to his principal; subject to the exceptions named, the law conclusively presumes that he has done so and charges the principal accordingly." (*The Distilled Spirits,* 11 Wall., 367.)
>
> Mechem on Agency, page 522, par. 722.
>
> *Dresser* v. *Norwood,* 17 C. B. (N. S.), 466.

We respectfully contend that in view of these authorities it was entirely immaterial whether the plaintiff Cramer himself had any knowledge whatever as to whether or not the Singer Company was back of the defense of his former suit against their agent, Fry; that as a matter of fact, and as a matter of intendment in the law, he was not expected to have any such knowledge; and we respectfully submit that the trial judge, in excluding all of the above testimony that showed, and tended to show, conclusively that the Singer Company was back of the Fry litigation, to the knowledge of plaintiff's attorneys, and indeed that the sole reason of the prosecution of its agent Fry by these attorneys was by reason of such knowledge, committed fatal error upon this vital point; and in overlooking the well-settled rule of law that if the attorneys knew of this fact and condition it was entirely immaterial whether their client knew it or not.

The testimony shows indisputably that a number of sewing machines were manufactured by George P. Bent with the treadle hung on point center screws passing through the lower ends of the cross-brace, at Chicago, in the years 1880 and 1881, and openly sold in the market, anticipating any alleged manufacture and sale of any one of the thirty-five treadles of Cramer; the manifest falsity of Cramer's attempt to carry back the date of his invention beyond this public use and sale of Bent.

Refused Instruction 13 is relied upon as the charge that ought to have been given by the court to the jury under the facts of this case, and the refusal to so instruct was manifest error.

> "Exception 13th. A witness false in one part of his testimony is to be distrusted in others."

The right of such an instruction, and the reason therefor, and the error of refusal is found upon the following facts and conditions undisputed in the record:

The record in this case is undisputed that in the winter of 1880 and 1881 Mr. George P. Bent, a manufacturer for a short time of sewing machines upon a small scale at the city of Chicago, Ill., through the advice of his foreman, Mr. Wm. H. Matchett, manufactured and put upon the market several hundred sewing machines with the treadle hung upon point-center screws that passed through the lower end of the cross-brace and locked and united such brace to the legs of the machine, and that such sewing machine was known to the market as the "Crown" Sewing Machine. Wood-cuts taken from the catalogue of Mr. Bent for the years 1881 and 1882 show this construction on page 231 of Record. There is no

dispute as to this fact. The machines themselves and the castings were all in evidence in the case, Mr. Bent testifying that the machines with these cross-braces "were put upon the market in the winter of the years of 1880 *and 1881*" *(Rec. 230)*, and reiterated this statement upon cross-examination. (Rec. 233.) Mrs. Susan Dilworth, a party using one of these machines with the treadle hung on point-center screws holding the brace to the stand continuously since February, 1882, so testified. (Rec. 236.)

Mr. William H. Matchett, manager for George P. Bent, and who got up this machine, testified as to these facts and to the manufacture of at least 100 of such braces and machines in the year 1881 (Rec. 240), and to the making of the patterns for these braces in the fall of 1880. (Rec. 241.) It is evident from Mr. Matchett's testimony that the transition from one of the old styles of brace of the Bent machine to the screw-pointed bolt having the double function of holding the brace to the legs of the stand and carrying the treadle upon its points, was easy and natural, as Mr. Matchett testifies that prior to 1880 the lower depending ends of the cross-brace in some of their stands "forked over the treadle rod." (Rec. 242.) An entire confirmation as to date of the manufacture and sale of these treadles is an advertisement in the "Sewing Machine Advance" of June 15, 1881, a paper of wide influence and wide circulation in the trade at that time. A cut of the first page of this publication appears on page 247, and a cut of the Bent machine, with its treadle hung on screw-point centers, on page 249. The editor of this paper, Mr. Walter Scates, was called and identified this publication and testified that he solicited the advertisement appearing therein prior to May, 1881. (Rec. 247.) It appears also that Mr. Bent pivoted his treadle in the

cross-bar in some of his machines instead of the cross-brace, for the reason that in many of his machines at that time the cross-brace did not extend below the middle of the stand. (Rec., bet. 230-31, shows this stand.) Matchett in his deposition testifies as to this fact. Without any opportunity of denial, we have seen that the treadle of the Singer stand is hung in an offset of the cross-bar by means of screw-pointed bolts fastened through holes in this offset and bar. Cramer attempted to escape the effect of these conditions in this case by trying to carry back the date of his invention prior to the fall of 1880, and attempted to do this by the only kind of testimony that he has introduced as to any of these matters, namely, that of himself, his son and daughter, the two latter being children at that time. Cramer testified that he first made his brace and treadle in a sewing machine in 1881. He says that he made the invention in June, 1880, and produces pieces of pasteboard with markings thereon, and so cut as to represent what he asserts to be a sewing-machine stand, also that he made his first machine with his patented brace in 1881. The testimony of Cramer as to this point appears on page 41 of the Record. His daughter, Mrs. Abbott, swears to the pasteboard models upon which appears the date of June 20, 1880. (Rec. 153.) There are three facts and conditions which negate the truth of this statement, and which strain the credulity of the human mind beyond the breaking point to believe it: *First*, nothing is more improbable than that Cramer, if he had made his invention in June, 1880, would have waited until the last of May, 1882, or within a few days of two years, before lodging his application for his patent in the Patent Office. As we have seen by the first application filed by Cramer, he undoubtedly wrote it himself and sent it to the Patent Office; and the

first thing that any man in Cramer's position does, who thinks he has an invention, is to get into the Patent Office with it immediately. Such a man is always afraid that some person else may get ahead of him, and that the Patent Office is the only safe refuge. For this reason, then, it is difficult to believe that if Cramer made any invention in 1880 he would have waited two years before filing his application in the Patent Office. *Second*, upon the trial of the case of Cramer against Fry, wherein the testimony as to the old Bent machine was there present and read, Cramer, who was then upon the stand and examined particularly upon this point, with every opportunity given him to so testify, never said a word about this story of the paper models and drawings of June 20, 1880, and the 1881 machine, but upon the contrary swore positively that the first casting for his brace was made about the month of February, 1882. (Rec. 257.) It took two or three pages of questions and answers, as shown in the record of the old Cramer-Fry litigation, to pin Cramer down as to when he first cast and put his first combination of brace and treadle in a sewing machine, but he finally, in answer to a direct question put to him by Judge McKenna, swore positively that it was in the year 1882. (Rec. 259.) This is Cramer's testimony in 1893, when he was seven years nearer the event than his present testimony. *Third*, Cramer, when he filed his first application in the Patent Office, there stated his invention as follows: "My invention consists in having the ends of the treadle-bar V-shaped to fit in a hole, brace C, also (heart)-shaped to receive the ends of the treadle-bar"—was rejected solely by reference to the Gregory patent of April 18, 1882, and to the Donovan patent of June 28, 1881. These patents are in evidence in this case. (Rec. 208-212.) The Donovan patent was ap-

plied for May 24, 1881, and the Gregory patent November 10, 1881. Nothing is more certain than that after Cramer's application got into the hands of Munn & Company, those parties would have taken the easiest way out of these rejections and references by simply having Mr. Cramer swear his date of invention back of them, and thus secure the grant of the patent. The fact that Cramer could not at that time carry his invention back of the dates of these patents upon which his application was rejected demonstrates conclusively that he did not make the supposed invention at the date he now testifies to, nor until a date after the date of the granting of these patents upon which he was rejected.

The late George Eliot defined a lie to be "an intellectual effort to meet an emergency." It is perfectly evident that Cramer's counsel in the first trial did not think the Crown machine had, as a matter of fact, the treadle hung in the lower depending ends of the cross-brace, as the Crown machine is simply the old Singer stand with the bolts carrying the treadle made long enough to bolt the lower ends of the brace to the machine. Even in this case, Cramer does not contend that in the Crown machine the treadle is hung in the vertical cross-brace, as shown by the following question and answer (Rec., p. 94):

> "Q. And in this Crown machine the treadle is not hung in the vertical cross-brace, is it?
> "A. In the vertical upright cross-brace? No, sir."

Yet the fear of the effect of this Crown machine upon his patent at the time of hearing the last case is shown by the following question and answer (Rec., p. 94):

> "Q. And still you say that you would claim that this was an infringement of your patent?
> "A. I do, sir.

"Q. Simply because it is a perfect alignment?
"A. Yes, sir."

Nothing can be plainer than that Cramer and his associates thought it necessary in this last trial to escape the effect of the Crown machine by carrying back the date of his patent by supposed old sketches. The whole performance is so strained and unnatural that it seems impossible to believe that it is not apocryphal, and that it is simply an intellectual effort upon the part of Cramer and his allies to meet a supposed emergency in this case.

As to this class of testimony this court has frequently commented, as in the case of *Clark Thread Co.* v. *Willimantic Linen Co.*, p. 481; the court says:

> "The only evidence on the question as to the time of Conant's invention is his own testimony, a species of evidence which, in cases of this kind, ought to be received with great caution. . . . No person accustomed to weigh the credibility of human testimony can fail to perceive the stress under which this evidence was given. . . . We feel bound to put this strict construction upon the patentee's evidence because such testimony, given for the purpose that this was, is necessarily subject to the gravest suspicion, however honest and well-intentioned the witness may be."

For these reasons, therefore, we respectfully submit that the said instruction 13 requested as above should have been given.

This case without a semblance of justification or palliation, for its commencement, or prosecution.

May it please the court, the more than fifty years open handed and fair dealing in the manufacture and sale of sewing machines by the Singer Company in this, and in all civilized countries of the commercial world, would

seem to render any affirmative statement upon their part to the effect that they had intended no wrong or injury to the patentee Cramer, or any inventor, humble or powerful, in the conduct of their business, needless; and that if they believed they had even unwittingly, whether the technical legal right existed or not, injured any inventor, they would have made honorable recognition and recompense therefor. That the Singer Company believe that the bringing of this suit is without palliation or justification, and the claim made by virtue of the Cramer patent, without right or equity, is manifest by the ten years' contest they have made in the resistance of this demand. It needs no eye of the seer, or ken of the wise, to read between the lines of this litigation, and so reading, see in the background, lying in ambush, the fact that speculators and adventurers are the real plaintiffs in this case, and are the real parties who planned and have carried out this attack upon the assets of the Singer Company; and that Cramer himself is but a mask, and would never have risked a dollar of money on any assertion in the courts of his patent against the company, or any other party.

Indeed, the record does show that many years before the bringing of this suit, Cramer was hunting for lawyers who would take his case against the Singer Company upon this patent with a contingent fee on contract relations for its conduct. (Rec., p. 60.)

The record shows also that in the year 1890 the plaintiff Cramer was hunting for, and attempted to make an arrangement with patent lawyers of San Francisco to take his case against the Singer Company upon his patent, upon a contingency, and was refused. (Rec., p. 382.) This attorney denying upon the stand in this case Cramer's statement to the jury that he had ever told

Cramer that the Singer Company's machine infringed his patent. This attorney, Mr. Wheaton, testifying that he told Cramer when he showed him his machine and patent that "he did not see anything in it that he thought would justify anything in the shape of litigation." (Rec., p. 381.)

It appears in this record also that Cramer in the year 1883, February 8th, wrote the Singer Company in general terms concerning his supposed invention, and offered to sell his patent (Rec., p. 46); that upon the 20th of the same month the Singer Company courteously replied thereto, stating that they received copies of all sewing-machine patents as they issue, and that after an examination of his, if they found anything of value in it that they cared to adopt, they would communicate with him further. (Rec., p. 47.)

Cramer says further, also, that upon September 25th, 1885, Cramer sent the Singer Company a letter in substance that he would like to sell his patent to them, and that the Diehl patent was an infringement of his, and received no reply thereto. (Rec., p. 49.)

These letters are without any import or importance, however, when we find that Cramer wrote every sewing-machine manufacturer of importance in the United States and attempted to sell them his patent, or receive some kind of an offer from them for the same, with the result as shown by the following quotations from his testimony:

> "Q. With how many of these different manufacturers of sewing machines did you try to make a deal for your patent?
>
> "A. *I think I wrote to all of them. So far as I remember now, it was to all of them.*" (Rec., p. 86.)

The result of this attempt to sell his patent, or obtain some recognition of it from all of the sewing-machine manufacturers of the United States is shown by the following question and answer (Rec., p. 87):

> "Q. Did you succeed in getting an offer for any kind of a deal for your patent, or for your invention, from any of these companies?
> "A. *No, sir. I did not.*"

When we remember in this connection that no sewing machine of any importance or standing in the United States has ever had hung the treadle in any way in the lower depending ends of the vertical cross-brace; when we remember that although the claim of Cramer is confined to a sewing machine, and his specification so amended as to strike out all other classes of machinery, and that there is not a line of testimony in this case that any other class of machinery, either directly or indirectly, has had hung its operative treadle in the vertical cross-brace—and when we remember that although this patent has expired several years, no sewing-machine manufacturer has changed its means or method of hanging their respective treadles, nor has any one of them hung the same in, or in connection with, the vertical cross-brace—and when we remember that the whole body of the testimony of practical witnesses in this case is that such hanging is without any utility or improvement over old methods, we can rightfully affirm that we think, for all these reasons, that this case is without a semblance of justification or palliation for its commencement or prosecution, and in no matter or thing, as a question of mechanics or of ethics, has the Singer Company done aught towards Cramer of which he has the slightest ground for complaint.

Conclusion.

In conclusion, your Honors, we most respectfully, hopefully, and confidently submit that from any possible view or standpoint that can be taken in a review of the law and facts in this case, as above presented, that it is clear that the affirmed judgment by the Circuit Court of Appeals, now the judgment of the court below, should be reversed, and the case remanded to said Circuit Court, with instructions to set aside the verdict, and dismiss the suit.

Respectfully submitted,

CHARLES K. OFFIELD.

CHARLES C. LINTHICUM.